No. 92-960

Supreme Court, U.S.
FILED
DEC 4 1992
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1992

THOMAS D. MCAUSLAND AND CHRISTOPHER M. PAFORT,
Petitioners

v.

UNITED STATES OF AMERICA,
Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

JOSEPH P. COVINGTON
DANIEL MARINO
MARY BETH SULLIVAN
Seyfarth, Shaw, Fairweather & Geraldson
Suite 500
815 Connecticut Ave., N.W.
Washington, D.C. 20006-4004
(202) 463-2400

ANDREW L. FREY
Counsel of Record
CLIFFORD M. SLOAN
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 778-0602

MARK H. TUOHEY III
ARTHUR G. WYATT
Reed, Smith, Shaw & McClay
1200 18th Street, N.W.
Washington, D.C. 20036
(202) 457-6100

65 pp

QUESTION PRESENTED

Whether a private citizen who obtains unclassified government information may be convicted of theft of government property (18 § U.S.C. 641) or wire fraud (18 U.S.C. § 1343) where disclosure of the information, although not prohibited by statute or published regulation, violates internal government rules, custom or practice.

TABLE OF CONTENTS

	Page
OPINION BELOW	1
JURISDICTION	1
PERTINENT STATUTES	2
STATEMENT	2
REASONS FOR GRANTING THE PETITION	10
A. Government Information Is Not Government Property Under The Theft-Of-Government-Property And Wire Fraud Statutes	12
B. Receipt of Government Information Is Not Criminal In The Absence Of A Statute Or Regulation Prohibiting Dissemination Of The Information	18
C. The Issue Is Of Recurring Importance	25
CONCLUSION	30
APPENDIX A	1a
APPENDIX B	16a
APPENDIX C	18a
APPENDIX D	20a
APPENDIX E	23a
APPENDIX F	25a

TABLE OF AUTHORITIES

Cases: **Page**

Carpenter v. *United States*, 484 U.S. 19 (1987) 17, 24

Chappell v. *United States*, 270 F.2d 274 (9th Cir. 1959) 13, 14

Dowling v. *United States*, 473 U.S. 207 (1985) 15

Kolender v. *Lawson*, 461 U.S. 352 (1983) 23

Liparota v. *United States*, 471 U.S. 419 (1985) 15

Morissette v. *United States*, 342 U.S. 246 (1952) 14, 19

Pearson v. *Dodd*, 410 F.2d 701 (D.C. Cir.), cert. denied, 395 U.S. 947 (1969) 14

United States v. *Barger*, 931 F.2d 359 (6th Cir. 1991) 20

United States v. *Conover*, 845 F.2d 266 (11th Cir. 1988) 17

United States v. *Croft*, 750 F.2d 1354 (7th Cir. 1984) 13

United States v. *DiGilio*, 538 F.2d 972 (3d Cir. 1976), cert. denied *sub nom. Lupo* v. *United States*, 429 U.S. 1038 (1977). 13

United States v. *Fowler*, 932 F.2d 306 (4th Cir. 1991) 13, 20

TABLE OF AUTHORITIES - Continued

Page

United States v. *Girard*, 601 F.2d 69 (2d Cir.), cert denied, 444 U.S. 871 (1979) 13, 19, 20

United States v. *Hubbard*, 474 F. Supp. 64 (D.D.C. 1979) 11, 13, 15, 22

United States v. *Jeter*, 775 F.2d 670 (6th Cir. 1985), cert. denied, 475 U.S. 1142 (1986) 13, 14, 20

United States v. *Kato*, 878 F.2d 267 (9th Cir. 1989) 17

United States v. *Kozminski*, 487 U.S. 931 (1988) 15

United States v. *Lambert*, 446 F. Supp. 890 (D. Conn. 1978) 19

United States v. *May*, 625 F.2d 186 (8th Cir. 1980) 13

United States v. *Morison*, 844 F.2d 1057 (4th Cir.), cert. denied, 488 U.S. 908 (1988) 20

United States v. *Perholtz*, 842 F.2d 343, (D.C. Cir.), cert. denied, 488 U.S. 821 (1988) 17

United States v. *Slay*, 858 F.2d 1310, (8th Cir. 1988) 17

United States v. *Tobias*, 836 F.2d 449 (9th Cir. 1988), cert. denied, 485 U.S. 991 (1989) 13, 15

TABLE OF AUTHORITIES - Continued

Page

United States v. *Truong Dinh Hung*, 629 F.2d 908 (4th Cir. 1980) 11, 14, 22

Virginia State Board of Pharmacy v. *Virginia Citizens Consumer Council*, 425 U.S. 748 (1976) 11

Williams v. *United States*, 458 U.S. 279 (1982) 15

Yates v. *United States*, 354 U.S. 298 (1957) 17, 24

Statutes, regulations, and rule:

18 U.S.C. § 371 . . . . . *passim*

18 U.S.C. § 641 . . . . . *passim*

18 U.S.C. § 1343 . . . . . *passim*

18 U.S.C. § 2511(1)(c) 16

26 U.S.C. § 7213 16

28 U.S.C. § 1254(1) 1

41 U.S.C. § 423 16

Federal Procurement Policy Act Amendments of 1988, Pub. L. No. 100-679, § 6(a), 102 Stat. 4063 27

Pub. L. No. 100-679, § 6(b), 102 Stat. 4068 (1988) 27

Pub. L. No. 101-28, 103 Stat. 57 (1989) 28

Pub. L. No. 101-194, § 507(1), 103 Stat. 1759 (1989) 28

TABLE OF AUTHORITIES - Continued

Page

28 C.F.R. § 45.735-10 20

48 C.F.R. § 5.401(b)(1) 26

Fed. R. Crim. P. 6(e) 20

Miscellaneous:

135 Cong. Rec. S5162 (May 11, 1989) 28

135 Cong. Rec. H1876 (May 15, 1989) 27

135 Cong. Rec. S15961, S15993 (Nov. 17, 1989) 27

Benjamin Duval, *The Occasions of Secrecy*, 47 U. Pitt. L. Rev. 579 (1986) 14

Harold Edgar & Benno Schmidt, *Curtiss-Wright Comes Home: Executive Power and National Security Secrecy*, 21 Harv. Civ. R.-Civ. Lib. L. Rev. 349 (1986) . . . 10, 18, 22

H.R. Rep. No. 911, 100th Cong., 2d Sess. 20 (1988) 27

Melville Nimmer, *National Security Secrets v. Free Speech: The Issues Left Undecided in the Ellsberg Case*, 26 Stan. L. Rev. 311 (1974) 15-16, 21, 22

TABLE OF AUTHORITIES - Continued

Page

Oversight of DOD's Management of Inside Information in the Acquisition Process: Hearings Before the Subcomm. on Oversight of Government Management of the Committee on Governmental Affairs, United States Senate, 101st Cong., 1st Sess. 41 (Feb. 24, 1989) 26, 27

"A Presumption for Public Access," WASHINGTON POST, Oct. 26, 1992, A20 . . . 25

Stewart, *"Or Of The Press"*, 26 Hastings L.J. 631 (1975) 29

In the Supreme Court of the United States

OCTOBER TERM, 1992

No.

THOMAS D. MCAUSLAND AND CHRISTOPHER M. PAFORT,
Petitioners

v.

UNITED STATES OF AMERICA,
Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

PETITION FOR A WRIT OF CERTIORARI

Thomas D. McAusland and Christopher M. Pafort petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINION BELOW

The judgment of the court of appeals was initially reported at 972 F.2d 343 (Table). Thereafter, the court ordered that its opinion be published (App., *infra*, 16a, 18a). The opinion (App., *infra*, 1a-15a) has not yet been reported.

JURISDICTION

The judgment of the court of appeals was entered on August 14, 1992. A timely petition for rehearing was denied on October 1, 1992 (App., *infra*, 16a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

PERTINENT STATUTES

The federal statutes regarding theft of government property (18 U.S.C. § 641), wire fraud (18 U.S.C. § 1343), and conspiracy to defraud the United States (18 U.S.C. § 371) are reprinted in the Appendix (App., *infra*, 25a-26a).

STATEMENT

This case raises fundamental issues regarding the imposition of criminal liability for receipt of government information. Petitioners were charged, tried, and convicted on a theory that (1) government information is government "property" under the pertinent statutes, and (2) conviction may be had even though no statute or published regulation prohibited dissemination of the information in question. The case thus presents far-reaching questions regarding the nature of the government's property interest in information in its possession and the reach of federal criminal statutes in protecting such interests. The issues are of recurring importance, practical as well as theoretical, and have spawned conflicting decisions in the lower courts.

Petitioners Thomas McAusland and Christopher Pafort, former marketing executives of Litton Data Systems, Inc. ("Litton"), were convicted of theft of government property (18 U.S.C. § 641), wire fraud (18 U.S.C. § 1343), and conspiracy to defraud the United States (18 U.S.C. § 371). The sole basis for the charges was their receipt of, and efforts to receive, unclassified government information. The theory of the government's case on all counts against petitioners was that they obtained government property without authority. The only government "property" at issue was what the government termed "procurement sensitive information."[1] There was no allegation that petitioners ever employed any

---

[1] C.A. App. 22-23, 35-36 (Indictment).

illegal means (such as larceny, bribery, or threats) to obtain the information. Rather, they hired a consultant, who in turn utilized his contacts within the relevant procurement officialdom to obtain data regarding the status of Litton's bids in certain procurements.

The question in this prosecution is not the ethics or desirability of this practice -- a matter debated in the Congress after the events at issue here (see pp. 26-28, *infra*) -- but whether such conduct falls within the reach of general criminal laws prohibiting the obtaining of government property by theft or fraud. Under the theory of the prosecution, which the courts below accepted, conviction may rest on the defendant's knowing receipt of information disclosed in violation of nothing more than government "custom and practice" or purely internal administrative directives.

1. This case involves petitioners' efforts to obtain procurement information during the period from early 1987 to early 1988. The responsibilities of both men at that time included keeping Litton fully advised of developments in prospective and pending procurements. C.A. App. 405-406, 454-471, 514-522. To that end, petitioners communicated with Thomas Muldoon, a private consultant retained by Litton to identify new business opportunities and to develop information on ongoing procurements. C.A. App. 234-237.

Petitioners received unclassified information from Muldoon concerning three procurements: (1) the Advanced Tactical Air Command Central (ATACC), a procurement for a radar command and control system conducted by the Space and Naval Warfare Systems Command (SPAWAR); (2) UYQ-21, a procurement for a second supplier of a radar display system conducted by Naval Sea Systems Command (NAVSEA); and (3) FOCS, a procurement to obtain a source for a Marine Corps fiber optic communications system.

Petitioners were aware -- indeed, fully expected -- that Muldoon would occasionally obtain unclassified information from government officials working on these procurements. See C.A. App. 240-244. It has never been suggested, however, that petitioners expected Muldoon to use illicit inducements or other unlawful means to procure the information (or that Muldoon did so). Rather, petitioners expected that Muldoon would use his knowledge and contacts to obtain certain types of procurement information from whoever would agree to release it.

2. Petitioners were charged in a six-count indictment with receiving or seeking to receive unclassified government information relating to the ATACC, UYQ-21, and FOCS procurements. Count 1 charged a conspiracy (alternatively) to defraud the United States or to commit the object theft and fraud offenses specified in the substantive counts (18 U.S.C. § 371); Count 2 charged the offense of theft of government property (*id.* § 641); and Counts 3-6 charged wire fraud offenses (*id.* § 1343).

The theory that connects the six counts is that petitioners, through Muldoon, obtained the disclosure of "certain information in the possession of the government" that was "[p]rocurement sensitive information" and that "was not to be disclosed to individuals and companies outside the government." C.A. App. 19, ¶ 6. According to the indictment (*ibid.*),

> [p]rocurement sensitive information included the "numbers" submitted in the initial proposals, the contents of the initial technical proposals, the source selection plans, and the percentage figures that government personnel used when weighing the scores for different evaluation criteria. In addition, before the evaluations of the initial proposals were completed, no information was to be released about

> the results of the evaluations or the rankings of the proposals by the evaluators.

The indictment cited no authority for this definition of "procurement sensitive information" or for the proposition that such material "was not to be disclosed."

The core transaction charged in the indictment is Muldoon's receipt and transfer to petitioners of information that Litton's ATACC proposal had been deemed unacceptable. The indictment alleges that Muldoon furnished this information to petitioners on October 1, 1987, some five months before the government formally advised unsuccessful offerors of the unacceptability of their proposals. Muldoon is alleged to have obtained the results of the preliminary evaluation of the ATACC proposals, including the unacceptability of Litton's proposal, from another private consultant, Mark Saunders, who in turned received this information from George Stone, the SPAWAR official responsible for conducting the ATACC procurement. C.A. App. 30-32, ¶¶ 24-28. This transfer of information is the sole basis of the charge in Count 2 that petitioners aided and abetted "others to knowingly convert * * * and without authority convey and dispose of a thing of value of the United States" (C.A. App. 35); the sole basis of numerous overt acts alleged in connection with the conspiracy and scheme charged in Counts 1 and 3 through 6 (C.A. App. 30-32, ¶¶ 24-28; C.A. App. 36, ¶ 2); and the sole basis of the two telephone calls charged as wire communications in Counts 4 and 5 (C.A. App. 37).

3. As the case proceeded, the prosecution's theory on all counts was that petitioners broke the law by receiving or seeking to receive "procurement sensitive information" that they knew government officials were "without authority" to disclose. See C.A. App. 69-70, 74, 77-79, 82, 83-84. Petitioners unsuccessfully objected that, if information was

property at all under the relevant statutes, the government was obligated to prove that dissemination of the information was prohibited by published regulation or statute.

a. Petitioners moved to dismiss the indictment. They argued that, in order to impose criminal liability for obtaining government information, the prosecution had to demonstrate that release of the information specified in the indictment was clearly prohibited by published rules or regulations; that the indictment did not rest on such a prohibition; and that the prosecution was unable to establish such a prohibition. The prosecution responded that it needed to show only that release of this information was contrary to internal government practices or policies of which petitioners had knowledge. The prosecution maintained that it could rely, among other things, on government "custom and practice."[2]

The district court denied the motion to dismiss. It first held that, under circuit precedent, information "is a species of property and a thing of value under [18 U.S.C. §] 641." App., *infra*, 20a. The court went on to rule, as the government contended, that in addition to other possible grounds, a government "custom and practice" of nondisclosure could be a permissible basis for liability. *Id.* at 21a-22a.

b. The prosecution's theory dominated its proof at trial. Thus, although both the prosecution and the defense introduced various of the then-existing federal regulations into evidence,[3] the government relied extensively on the testimony

---

[2] Tr. 5/9/91, 39, 40-41, 43; see also Gov't Opp. To Motion To Dismiss, 6-7.

[3] The government claimed that, with respect to some (but not all) of the information at issue, dissemination of the information was in

(continued...)

of government procurement officials regarding internal practices and policies that purportedly prohibited release of the "procurement sensitive information."[4] The prosecution also introduced internal government directives to this effect.[5] Without abandoning their legal position that lack of authority could be proven only with reference to clear, *published* regulations or statutes, petitioners also vigorously contested the prosecution's proof on its own terms. See Pet. C.A. Br. 16 n.4.

Likewise, the prosecution's theory vitally shaped its proof that petitioners knew that release of the information specified in the indictment would be unauthorized. The prosecution sought to establish *scienter* in part through opinion witnesses who testified that procurement industry executives in petitioners' positions would have been aware of the government's internal disclosure practices.[6] On this point, too, petitioners vigorously disputed the government's proof. See Pet. C.A. Br. 17 & n.5.

The prosecution's theory -- that a prohibition on dissemination of information in published regulations or statutes is unnecessary -- also figured prominently in the

---

[3] (...continued)
fact prohibited by published regulations. Petitioners disputed this contention, but the point is of little moment here. The government adamantly insisted that no such prohibition was necessary, and the jury was never required to find that petitioners had knowledge that the disclosures they obtained violated any published restriction on dissemination. See page 8, *infra*.

[4] *E.g.*, C.A. App. 349-351, 356-365, 397-398, 443-445, 496-497.

[5] *E.g.*, C.A. App. 247, 252-253.

[6] *E.g.*, C.A. App. 410-417, 502-507.

presentation of the core transaction charged in the indictment (Muldoon's receipt and conveyance of the information that Litton's ATACC proposal had been deemed unacceptable). The procurement officials assigned to perform the preliminary technical evaluation of the ATACC proposals had determined that Litton's proposal was technically unacceptable by early September 1987, *before* this information was conveyed by Stone to Saunders (and thereafter by Saunders to Muldoon).[7] Pointing to regulations establishing a contractor's right to be informed immediately of such a determination, petitioners contended that they could not be convicted on the basis of their receipt of this information. Prosecution witnesses, however, testified that, regardless of the published regulations, an internal government practice prohibited disclosure of the unacceptability determination prior to the filing of a "business clearance" by the source selection authority.[8] The district court held that the jury could consider this "background of custom and practice" in evaluating this critical transfer of information. C.A. App. 178.

c. The prosecution's theory governed the jury instructions. The court rejected petitioners' requests that the jury be instructed that the prosecution was required to "show that a particular federal statute, rule or regulation prohibited the release of the information" (C.A. App. 169), and that the jury should acquit if it entertained reasonable doubt that petitioners "knew that the information * * * was released without authority in violation of [federal] regulations" (C.A. App. 167).

d. The jury convicted petitioners on all six counts. Petitioners filed post-trial motions for acquittal. They renewed their argument that the statutes did not permit

---

[7] *E.g.*, C.A. App. 216, 374, 387-388, 392-393, 489-490.

[8] *E.g.*, C.A. App. 420-421, 424-425, 442, 511.

conviction in the absence of a published prohibition on dissemination, and that, if they were construed as broadly as the prosecution urged, the statutes would violate due process.

Although ruling for the prosecution, the district court expressed serious doubts about its theory. The court found it "painfully obvious" that this was "a troublesome area * * * because it's a novel area. No case is directly in point. No case is itself entirely nourishing." App., *infra*, 23a. The court emphasized that "[i]t's a very close question in the Court's mind on the due process issue." *Ibid.* Noting that "it will not surprise the Court if [petitioners'] argument ultimately is vindicated on appeal," the court nevertheless denied the motion for acquittal. *Id.* at 24a.

e. The only point at which the district court credited petitioners' arguments on the lack of clear, precise, and public regulations restricting disclosure was in connection with sentencing. The court found that the offenses of which petitioners were convicted had been "committed under an unclear regulatory regime that was later clarified" by legislation (discussed at pp. 26-28, *infra*). C.A. App. 63, 65. On this basis, the court granted petitioners' motions to depart downward in their respective sentences under the Guidelines. The court sentenced each petitioner to concurrent 12-month terms of imprisonment on each count of the indictment. C.A. App. 40, 44.

4. The court of appeals affirmed. With respect to the threshold issue whether Section 641 encompasses government information, the court relied on circuit precedent broadly construing "thing of value" to include government information. App., *infra*, 9a n.2.

The court of appeals also squarely rejected petitioners' contention that criminal liability could be imposed "only if disclosure of the information was clearly prohibited by published [laws or regulations]." App., *infra*, 10a. The

court acknowledged that prior decisions, including a leading Second Circuit case, had characterized an agency's rules and regulations "'as both a delimitation and a clarification of the conduct proscribed' under Section 641." *Id.* at 11a. It held, however, that "the existence of a published regulation proscribing disclosure" was unnecessary. *Ibid.* A regulation was not "the exclusive method of preventing vagueness"; the "'government's longstanding practice'" of nondisclosure could be sufficient for criminal liability. *Ibid.* Because of its resolution of this legal issue, the court rejected petitioners' related challenge to the jury instructions. *Id.* at 14a.[9]

REASONS FOR GRANTING THE PETITION

This case raises an issue of exceptional importance -- the appropriate standard for criminal liability, under general federal theft and fraud statutes, for a private citizen's receipt of government information. While there are cases applying these statutes to disclosure of certain types of information, the ruling below represents the first appellate decision to broaden these prohibitions to impose liability for receipt of government information in the absence of any statute or regulation clearly prohibiting unauthorized dissemination of the information in question. "[T]here is no more important question about the extent to which the courts will fashion secrecy policy with Congress in the wings than whether or not [general criminal statutes] will be construed to reach an employee's unauthorized transfer of government information, or copies of government documents."[10] It is an issue, more-

---

[9] The court also rejected petitioners' challenges based on midtrial publicity and the admissibility of evidence of prosecution witnesses' plea bargains. App., *infra*, 14a-15a. They are not renewed here.

[10] Harold Edgar & Benno Schmidt, *Curtiss-Wright Comes Home: Executive Power and National Security Secrecy*, 21 Harv. C.R.-C.L. L. Rev. 349, 402 (1986).

over, on which lower courts have reached sharply divergent results and on which this Court's review is necessary to establish uniformity.

Obviously, the notion that a private citizen can be prosecuted for "theft" of government information -- prosecuted, that is, *not* for receiving tangible government documents or records removed without authority from the government's possession, but rather for receiving mere *facts* about government information *disclosed* without authority -- must be implemented "with extreme care." *United States* v. *Truong Dinh Hung*, 629 F.2d 908, 924 (4th Cir. 1980) (separate opinion of Winter, J.). "The free exchange of ideas, *especially* ideas in possession of the government, is at the very heart of our first amendment guarantees." *United States* v. *Hubbard*, 474 F. Supp. 64, 80 (D.D.C. 1979) (emphasis added). This principle holds true not only in the political realm but also in the economic realm, where the vigorous pursuit and exchange of commercial information are recognized as "indispensable" to the operation of a "free enterprise economy." *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council*, 425 U.S. 748, 765 (1976). The court of appeals' decision tramples on these sensitive values.

The court of appeals' resolution of the government information issue is fundamentally flawed in two respects. First, as a threshold matter, government information simply is not government property under the pertinent statutes. Second, even if the statutes are broad enough to reach some forms of government information, criminal liability may not be imposed in the absence of some specific and public statute or regulation explicitly prohibiting disclosure of such information. These are issues that have importance transcending the specific context of government procurement, and respecting which the interpretation of the court below is both unsound and inconsistent with decisions of other courts.

A. Government Information Is Not Government Property Under The Theft-Of-Government-Property And Wire Fraud Statutes

Government information is fundamentally different from tangible government property. Dominion and use of tangible government property (such as a typewriter, a chair, or a vehicle) are necessarily limited and exclusive; in contrast, there is no comparable limitation on the number of persons who can simultaneously share use of government information. Access to information about the operations of the government, moreover, ranks among the highest values of a free society. Petitioners readily acknowledge that categories of government information may be removed from the public domain; but congressional intent to characterize government information as exclusive government property -- for which access and use are extremely limited -- should not be lightly presumed. With respect to the theft and wire fraud statutes (18 U.S.C. §§ 641 & 1343), government information is not government property.

1. Section 641 prohibits the embezzlement, theft, or conversion (or unauthorized sale, conveyance, or disposal) of "any record, voucher, money, or thing of value of the United States." The "thing of value" that petitioners were charged with converting was "procurement sensitive information." C.A. App. 35 (Indictment, Count 2). The courts of appeals are squarely split on the question whether government information may be considered a "thing of value" within the reach of the statute. The Ninth Circuit has long held -- and recently reaffirmed -- that "section 641 should not be read to apply to intangible goods." *United States* v. *Tobias*, 836 F.2d 449, 451 (9th Cir.), cert. denied, 485 U.S. 991 (1988); see also *Chappell* v. *United States*, 270 F.2d 274, 276 (9th Cir. 1959). In the context of government information, three

Circuits have explicitly reached the opposite conclusion.[11] One Circuit has explicitly reserved the issue.[12] And at least one district court in still another Circuit has agreed with the Ninth Circuit and refused to permit the government to proceed on the theory that government information is a "thing of value" within the scope of 18 U.S.C. § 641.[13] Finally, individual court of appeals judges have concluded that 18 U.S.C. § 641 should not be applied to certain categories of information.[14]

---

[11] See *United States* v. *Girard*, 601 F.2d 69, 70-71 (2d Cir.), cert. denied, 444 U.S. 871 (1979); *United States* v. *Jeter*, 775 F.2d 670, 680 (6th Cir. 1985), cert. denied, 475 U.S. 1142 (1986); *United States* v. *Fowler*, 932 F.2d 306, 309-310 (4th Cir. 1991). Both *Jeter* and *Fowler* explicitly reject the Ninth Circuit's interpretation. *Jeter*, 775 F.2d at 680; *Fowler*, 932 F.2d at 309-310. In this case, the court of appeals relied on its *Fowler* precedent. App., *infra*, 9a n.2.

Two other Circuits have disagreed with the Ninth Circuit's ruling in the context of a different intangible (appropriation of government services). See *United States* v. *Croft*, 750 F.2d 1354, 1359-1362 (7th Cir. 1984); *United States* v. *May*, 625 F.2d 186, 190-192 (8th Cir. 1980).

[12] See *United States* v. *DiGilio*, 538 F.2d 972, 978 (3d Cir. 1976), cert. denied *sub nom. Lupo* v. *United States*, 429 U.S. 1038 (1977).

[13] See *United States* v. *Hubbard*, 474 F. Supp. 64, 80 (D.D.C. 1979) (discussing *Chappell* and concluding that "the government will not be permitted to rely on any alleged conversion of government information for a violation of section 641 in this case").

[14] See *Truong*, 629 F.2d at 926 (separate opinion of Winter, J.) (Section 641 does not apply to classified information); *United States*

(continued...)

We respectfully submit that the better view of Section 641 is that one who induces even an unauthorized disclosure of government information has not "conver[ted]" a "thing of value of the United States." The statutory language is at best ambiguous as to whether information is the kind of "thing" with which the prohibition is concerned, and it is clear that the legislative intent reveals no purpose to reach that far.[15] Indeed, the common law tort of "conversion" applied only to tangible property.[16] Particularly because this Court has made clear that the enactment of Section 641 "was not intended to create new crimes but to recodify those then in existence" (*Morissette* v. *United States*, 342 U.S. 246, 269 n.28 (1952)), there is no reason to conclude that Section 641 represented a dramatic expansion of criminal liability to include a crime of "converting" government information. Indeed, in construing an analogous statute regarding the interstate transportation of stolen and "converted" goods, this Court refused to accept an expansion of the statute to cover intangibles such as an unauthorized recording; instead, the

---

[14] (...continued)
v. *Jeter*, 775 F.2d at 683 (Merritt, J., dissenting) (Section 641 does not apply to grand jury information).

[15] See, *e.g.*, Benjamin DuVal, *The Occasions of Secrecy*, 47 U. Pitt. L. Rev. 579, 596 n.42 (1986) ("[N]o one contends that it occurred to Congress that it was restricting the dissemination of information when it enacted [18 U.S.C. 641]."); *Truong*, 629 F.2d at 926 (separate opinion of Winter, J.) ("Congress was never consciously aware that § 641 would punish the unauthorized disclosure of government information and * * * this use of § 641 is a relatively recent innovation.").

[16] See *Chappell*, 270 F.2d at 277 (reviewing common law history). See also *Pearson* v. *Dodd*, 410 F.2d 701 (D.C. Cir.) (unauthorized reproduction of information is not common law conversion), cert. denied, 395 U.S. 947 (1969).

Court held that the statute requires "some prior physical taking of the subject goods." *Dowling* v. *United States*, 473 U.S. 207, 216 (1985).

Fundamental principles of statutory construction likewise weigh against the expansion of Section 641 to embrace government information. The rule of lenity requires adopting the narrower of two plausible constructions of a criminal statute,[17] and a conclusion that a "thing of value" does not include government information is, at the very least, a plausible construction of the statute. In addition, interpreting the statute to embrace government information would give rise to difficult constitutional questions because it would place extremely broad discretion in the hands of government officials to punish undesired dissemination of such information.[18]

---

[17] See, *e.g.*, *United States* v. *Kozminski*, 487 U.S. 931, 952 (1988) ("adher[ing] to the time-honored interpretive guideline that uncertainty concerning the ambit of criminal statutes should be resolved in favor of lenity"); *Liparota* v. *United States*, 471 U.S. 419, 429 (1985); *Williams* v. *United States*, 458 U.S. 279, 290 (1982).

[18] See generally *United States* v. *Tobias*, 836 F.2d at 451 (Ninth Circuit's interpretation "avoid[s] the first amendment problems which might be caused by applying the terms of section 641 to intangible goods"); *United States* v. *Hubbard*, 474 F. Supp. at 79 ("[i]f section 641 reaches the theft of government information, * * * serious first amendment questions would be raised, and there is ample legal authority to avoid those constitutional questions by interpreting the statute to not include information as a thing of value"). See also Melville Nimmer, *National Security Secrets v. Free Speech: The Issues Left Undecided in the Ellsberg Case*, 26 Stan. L. Rev. 311, 322 (1974) ("[t]he right to disseminate information regarding the activities of the federal government lies at the

(continued...)

Acceptance of the foregoing argument does not, of course, in any way constrict the power of Congress to employ the criminal sanction to help protect the secrecy of information in the government's possession. Thus, the statutes specifically criminalizing unauthorized disclosure of such information as tax returns or information obtained through electronic surveillance (18 U.S.C. § 2511(1)(c), 26 U.S.C. § 7213) -- or the recently enacted Procurement Integrity Act (41 U.S.C. § 423, see pp. 26-28, *infra*) -- are undiminished in scope or efficacy by the common sense reading of Section 641 that we advocate. All that we ask -- and the least this Court should insist upon -- is the enactment of criminal prohibitions clearly worded and actually intended to bring the criminal sanction to bear to preserve the secrecy of specific identifiable types of information.

2. The wire fraud counts similarly charged petitioners with a scheme to defraud the United States of a "property" interest by depriving it of its "control over, and exclusive use of, procurement sensitive information." C.A. App. 36-37; Tr. 1885-1886. The same reasons why dissemination of government information is not conversion of a "thing of value" under Section 641 dictate the conclusion that dissemination of government information is not a scheme to defraud the government of "property" under Section 1343. Nothing in the statutory language or legislative intent suggests a legislative design to embrace government information as property; the rule of lenity requires adoption of the narrower construction; and exclusion of government information from

---

[18] (...continued)
very core of the freedoms of speech and press protected by the first amendment").

the scope of the statute avoids difficult constitutional problems.[19]

---

[19] In *Carpenter* v. *United States*, 484 U.S. 19, 25 (1987), this Court held that a private party's "confidential business information" is "property" within the scope of the wire fraud statute. "Confidential business information" generated by a private entity, however, carries a strong presumption of exclusivity; such a presumption is entirely inapplicable to government information, which is presumptively non-secret and the regulation of which may raise significant constitutional issues. See note 18, *supra*. See also, *e.g.*, *United States* v. *Kato*, 878 F.2d 267, 268-269 (9th Cir. 1989) (government interest in accurate information is not property interest under mail fraud statute); *United States* v. *Slay*, 858 F.2d 1310, 1316 (8th Cir. 1988) (government interest in receiving information is not property interest under mail and wire fraud statutes); *United States* v. *Conover*, 845 F.2d 266, 271 (11th Cir. 1988) (information is not property under mail fraud statute in the absence of evidence that it is "confidential business information"). But see, *e.g.*, *United States* v. *Perholtz*, 842 F.2d 343, 366-367 (D.C. Cir.) (government information is government property under mail fraud statute), cert. denied, 488 U.S. 821 (1988).

If petitioners' convictions for theft and wire fraud are set aside, their conspiracy convictions under 18 U.S.C. § 371 must also be set aside. The conspiracy charge rested, as one alternative, on a conspiracy to violate the theft and wire fraud statutes (C.A. J.A. 22); a legal inadequacy in either of those substantive charges thus would require a conclusion that the conspiracy convictions also could not stand. See *Yates* v. *United States*, 354 U.S. 298, 311-312 (1957). Furthermore, attempts to obtain information, dissemination of which is not prohibited by statute or regulation, cannot properly be found to be a conspiracy to defraud the United States. See note 30, *infra*.

B. Receipt Of Government Information Is Not Criminal In The Absence Of A Statute Or Regulation Prohibiting Dissemination Of The Information

If, notwithstanding the considerations discussed above, government information can sometimes qualify as government property capable of being stolen or taken by fraud under the pertinent statutes, vitally important questions arise as to the nature of protectible property interests under those statutes. Needless to say, not all information in the possession of the government comes within the covered category; there must be some appropriate and adequate assertion of a confidentiality interest in the information. Petitioners' position has been and is that the theft and fraud statutes could at most apply to the disclosure of information in contravention of clear, *public* regulations or statutes. Such an interpretation protects private citizens from being unfairly surprised by criminal prosecution and stops individual government officials from "creat[ing] an 'Official Secrets Act' through relentless expansion of general legislation that was obviously not enacted for speech restricting purposes."[20] At the same time, this construction accommodates the government's legitimate interest in safeguarding information where it is appropriate to do so, by establishing the confidential status of the information through the public law-making process.

As on the threshold issue, the lower courts are divided on this vitally important issue, and this Court's review is essential to resolve uncertainty and confusion.

1. Section 641 prohibits the conversion, conveyance, and disposal, "without authority," of "a thing of value of the

---

[20] Edgar & Schmidt, 21 Harv. C.R.-C.L. L. Rev. at 405.

United States."[21] The statutory requirements of "without authority" and "thing of value" are thus central to Section 641's applicability to dissemination of government information. Rigorous construction of these statutory terms requires that, in order for the prohibition to apply to government information, the government must manifest its proprietary, exclusionary interest in such information through published statutes or regulations. This interpretation is essential to give concrete, objective meaning to the statutory requirements of authority and property in the context of government information. The alternative view, adopted here by the court of appeals, creates extremely amorphous liability for receipt of government information, under which the "without authority" and "thing of value" elements have no clear, consistent, and ascertainable meaning.[22]

The ruling below greatly expands criminal liability because it holds that criminal sanctions may be imposed for receipt of information in the absence of a statute or regulation prohibiting dissemination of the information. See App., *infra*, 11a (holding that "the disclosure of the procurement information need not have been proscribed by published [regulation]"). The Second Circuit, in contrast, has held that

---

[21] Although the phrase "without authority" modifies only the words "sell[ing], convey[ing] or dispos[ing] of * * * anything of value of the United States," the offense of "conversion" as embodied in the statute is also understood to require proof of the "unauthorized use[ ] of government property." *Morissette* v. *United States*, 342 U.S. at 272.

[22] Indeed, one court has concluded that, in the absence of a more narrow construction such as we propose, "[t]he statutory phrase 'without authority' is virtually devoid of meaning when applied to the transfer of information." *United States* v. *Lambert*, 446 F. Supp. 890, 898 (D. Conn. 1978), aff'd, *United States* v. *Girard*, *supra*, cert. denied, 444 U.S. 871 (1979).

an agency's "rules and regulation forbidding * * * disclosure may be considered as *both a delimitation and a clarification* of the conduct proscribed by [Section 641]." *United States* v. *Girard*, 601 F.2d at 71 (emphasis added).[23] See also *United States* v. *Jeter*, 775 F.2d at 682 ("follow[ing] lead of *Girard*" in upholding Section 641 conviction for conversion of grand jury transcripts, disclosure of which is specifically prohibited by Fed. R. Crim. P. 6(e)).[24] The question whether criminal liability for receipt of information may be imposed in the absence of a statute or regulation prohibiting receipt of such information is a fundamental issue of undeniable significance.[25]

---

[23] In *Girard*, the court upheld convictions for unauthorized disclosure of law enforcement information from Drug Enforcement Administration (DEA) files on the ground that dissemination of the information was explicitly prohibited by public regulations. 601 F.2d at 71.

[24] Indeed, prior to this case, the Fourth Circuit itself had upheld criminal liability for dissemination of government information only when disclosure of the information was prohibited by statute or regulation. See *United States* v. *Morison*, 844 F.2d 1057, 1074, 1079 (4th Cir.) (relying on "the classification system" and the public regulations regarding classified information), cert. denied, 488 U.S. 908 (1988); *United States* v. *Fowler*, 932 F.2d 306 (4th Cir. 1991) (upholding prosecution based on dissemination of classified information). See also *United States* v. *Barger*, 931 F.2d 359, 367-369 (6th Cir. 1991) (upholding sufficiency of evidence for Section 641 conviction for conversion of law enforcement information, improper disclosure of which was prohibited by 28 C.F.R. 45.735-10).

[25] Even if the government were correct in its contention that dissemination of *some* of the "procurement sensitive information" was in fact prohibited by regulation (see note 3, *supra*) that would

(continued...)

The rationale for limiting the reach of the statute is obvious: in the absence of such a limiting construction, application of Section 641 to information-gathering would pose an intolerable risk of unfair surprise and government overreaching. As discussed (see pp. 14-15, *supra*), coverage of government information was not contemplated when Section 641 was enacted. Accordingly, the fit, if any, between the language of the statute and information-gathering is extremely loose. Unless Section 641 is tied to specific prohibitions on disclosure, the receipt of government information could be deemed "unauthorized" merely because its disclosure is contrary to official wishes.

Such a reading of the statute clearly invites abuse. Under it, Section 641 could be used "as a vehicle for rendering criminal the reproduction of the most innocuous and the most significant types of governmental documents without reference to whether any such reproduction would be injurious to the national security or to any other legitimate governmental

---

[25] (...continued)
in no way affect the "certworthiness" of this case. *First*, the legal theory of the case, embraced by the district court and affirmed by the court of appeals, was that no such prohibition was necessary. *Second*, the government does not deny that dissemination of at least some of the "procurement sensitive information" (including information at the core of the indictment) was prohibited, if at all, only by internal government directives or custom (*e.g.*, Gov't C.A. Br. 17-18 & nn.11-12, 31 n.18). *Third*, knowledge of the lack of authority is an essential element of the offense, and there is no finding here (and little if any evidentiary basis for a finding) that petitioners believed or knew that the disclosures they sought violated federal regulations; indeed, the district court specifically refused to give an instruction that would have required the jury to find such knowledge in order to convict. C.A. App. 167.

interest."[26] Such an interpretation would make it a crime to transfer "not just classified documents, or even documents relating to the national defense, the reproduction of which may be rendered criminal, but any documents which a governmental official may, in his uncontrolled discretion, decide should not be reproduced."[27]

The limitation present in other court of appeals decisions regarding dissemination of government information -- that an independent prohibition be stated in a statute or public regulation -- resolves these problems. By treating Section 641 as a means of enforcing *independent* regulatory or statutory prohibitions on disclosure of information, such as those comprising the classification system or protecting trade secrets in the government's possession, this construction of the statute assures private citizens of fair notice that information-gathering -- an activity that is ordinarily treated as socially desirable -- is in fact unlawful in a particular setting. Insisting on the codification of nondisclosure rules

---

[26] Nimmer, 26 Stan. L. Rev. at 322.

[27] *Ibid*. See also *Truong Dinh Hung*, 629 F.2d at 925 (separate opinion of Winter, J.) ("[u]nder § 641 as it is written, no precise standard controls the exercise of discretion by upper level government employees when they decide whether to forbid or permit the disclosure of government information"); *Hubbard*, 474 F. Supp. at 80 ("[i]f a person came across certain completely unclassified information during his employment within the federal government, and discussed it outside the scope of his employment, an argument could be made that he had converted government information in violation of Section 641. Of course, such an interpretation would be impermissible."); Edgar & Schmidt, 21 Harv. C.R.-C.L. L. Rev. at 406 (if construed to punish receipt or transfer of information simply against official wishes, Section 641 "becomes yet another instrument by which the Executive is empowered to pick and choose its targets for suppressing speech").

also constrains the discretion of government officials who might otherwise impede the flow of government information for illegitimate reasons. At the same time, where an official legitimately seeks to police the disclosure of information that *has* been accorded confidential status through the public law-making processes -- such as classified information or law-enforcement data -- this construction permits effective vindication of governmental interests.[28]

Thus, if government information can ever be considered government property for purposes of the general theft and fraud statutes at issue here, it is essential that the government secrecy interest protected by those criminal sanctions be limited to that defined by statute or public regulation.[29]

2. The wire fraud counts in this case were tried and submitted to the jury on essentially the same theory as the theft count: that inducing an official to disclose information that a defendant knows the official is not supposed to disclose constitutes a scheme to defraud the government of property for purposes of Section 1343. See C.A. J.A. 186-187, 195. The question of when a person can fairly and legitimately be held to know that government officials are "without authority" to transfer information for purposes of Section

---

[28] Even in the absence of a statute or regulation prohibiting dissemination of government information, moreover, the government may take appropriate employment disciplinary actions against employees who violate internal directives against disclosure; the issue here is solely whether criminal liability may be imposed for theft of government information in the absence of such a statute or regulation prohibiting the dissemination.

[29] Indeed, in the absence of such a saving construction, the pertinent statutes would violate the Due Process Clause because they would fail to give fair notice of prohibited conduct. *Kolender* v. *Lawson*, 461 U.S. 352, 357 (1983).

1343 raises the same concerns as does the question of when a person can fairly and legitimately be held to know that transfer of government information is "without authority" for purposes of Section 641. So too, the question whether the government's interest in secrecy of information is protectible as a property interest -- if defined under Section 641 in terms of creation through public laws or regulations -- is likewise circumscribed for purposes of Section 1343. Consequently, the answer to both questions should be the same: the criminal prohibition arises only when the release of information is clearly proscribed by published regulation or statute.[30]

---

[30] In *Carpenter* v. *United States, supra*, this Court upheld mail and wire fraud convictions for disclosure of "confidential business information." As discussed (note 19, *supra*), the presumption whether information is proprietary is entirely different for private entities than it is for the government. In *Carpenter*, moreover, the Court noted that maintaining the confidentiality of the information was "[t]he *official* policy and practice" of the newspaper as reflected by a "declaration to that effect in the employee manual." *Id.* at 23, 28 (emphasis added). Statements of official policy in employment manuals serve the same notification function for employees in the workplace as do public regulations or statutes for private citizens in society at large.

For the same reasons that govern the construction of Sections 641 and 1343, efforts to obtain information from the government, in the absence of a regulation or statute prohibiting dissemination of the information, are not a conspiracy to defraud the United States. And, in any event, if the convictions on the substantive counts are invalid, the conspiracy conviction must be set aside because it is likely to rest on an impermissible basis. See *Yates* v. *United States, supra*.

C. The Issue Is Of Recurring Importance

1. The decision below radically (and dangerously) expands the prosecutor's arsenal. Under it, virtually any leak of government information could be the basis for criminal liability. The tension between this sweeping new theory of information theft and conduct that is pervasive throughout our political and economic life is evidenced by the broad range of groups that participated below as *amici curiae*.[31] Journalists, scholars, and other members of the press routinely seek out unclassified information from government sources, even knowing that its release is contrary to agency "custom and practice."[32] It is also commonplace for private citizens and companies to seek out government information for use in their businesses, so long as disclosure is not prohibited by statute or regulation.[33] A rule of law that may expose so vast a range of conduct to criminal liability clearly warrants this Court's attention and consideration.[34]

---

[31] Among the groups submitting *amicus* briefs in support of petitioners were the Washington Post; the American Society of Newspaper Editors; the Newsletter Publishers Association, Inc.; the Radio-Television News Directors Association; the Reporters Committee for Freedom of the Press; the American Civil Liberties Union; the Newspaper Guild; the Electronic Industries Association; and the Washington Legal Foundation.

[32] See Washington Post, *et al.* C.A. Br. 4-6, 16-17.

[33] See Washington Legal Foundation C.A. Br. 11-13; Electronic Industries Association C.A. Br. 2-3.

[34] The court of appeals' decision has only intensified the concerns expressed by amici below. See, *e.g.*, "A Presumption for Public Access," WASHINGTON POST, Oct. 26, 1992, A20 ("[P]rosecutors have acted on, and an appeals court has approved, a sweeping

(continued...)

2. The pertinent regulatory context in this case highlights the importance of the issue and illustrates the unfairness of permitting criminal prosecution under broad interpretations of statutes whose stated or intended domain does not clearly encompass the type of conduct at issue.

The district court's conclusion at sentencing -- that petitioners' efforts to obtain government information occurred "under an unclear regulatory regime that was later clarified" (C.A. App. 63, 65) -- was, if anything, an understatement. Before 1990, the Federal Acquisition Regulations (FARs) authorized "[c]ontracting officers [to] make available maximum information to the public" so long as disclosure did not "provide undue or discriminatory advantage to private or personal interest." 48 C.F.R. § 5.401(b)(1) (1987). The question of when disclosure would be deemed to result in "undue or discriminatory advantage" was not answered anywhere in the federal regulations but rather was committed to "the discretionary authority of the program manager," to be answered on "a case-by-case basis."[35] High-ranking government officers recognized, and approved of, a system in

---

[34] (...continued)
theory that criminalizes the receipt of government information that is neither classified nor clearly protected by any other law. If this ruling is allowed to stand, reporters and other private citizens could be sent to jail for receiving tips about government corruption, telephone calls about proposed policy changes that are sure to be controversial, or whistle-blower complaints about government inefficiency or inaction.").

[35] *Oversight of DOD's Management of Inside Information in the Acquisition Process: Hearing Before The Subcomm. on Oversight of Government Management of the Committee on Governmental Affairs, United States Senate*, 101st Cong., 1st Sess. 41, 42 (Feb. 24, 1989) (testimony of Robert B. Costello, Under Secretary of Defense for Acquisition) [hereinafter *"Oversight Hearing"*].

which, "[a]t the same time that industrial suppliers seek information to better enable themselves to meet the Government's needs, each supplier also seeks information in order to influence those needs and to gain advantage over its competitors."[36]

It was only some time *after* petitioners' conduct that Congress decided to change this regime and, for the first time, specifically make it a crime for any "competing contractor or any officer, employee, representative, agent, or consultant of any competing contractor * * * knowingly * * * [to] solicit or obtain, directly or indirectly, from any officer or employee of such agency, prior to the award of a contract, any proprietary or source selection information regarding [a] procurement."[37] Congress fully appreciated just how sharp a break the Procurement Integrity Act was with existing law.[38] Accordingly, Congress initially delayed

---

[36] *Id.* at 74 (testimony of Under Secretary of the Navy H. Lawrence Garrett III).

[37] Federal Procurement Policy Act Amendments of 1988, Pub. L. No. 100-679, § 6(a), 102 Stat. 4063 ("Procurement Integrity Act"), codified at 41 U.S.C. 423(a)(3) and (j) (Supp. II 1990).

[38] See H.R. Rep. No. 911, 100th Cong., 2d Sess. 20 (1988) (recognizing that prior to Procurement Integrity Act there were "no laws designed specifically to address * * * insider trading of sensitive procurement information"). See also 135 Cong. Rec. S15961 (Nov. 17, 1989) (Sen. Grassley) ("[T]his is the only law * * * on the books that restricts the use of nonclassified procurement information."); *id.* at S15993 (Sen. Glenn) (although other laws prohibit practices identified in "[I]ll [W]ind such as bribery of public officials, there is no law except [P]rocurement [I]ntegrity which establishes civil and criminal penalties for trafficking in unclassified, procurement-sensitive information."); (continued...)

the effective date of the Procurement Integrity Act for six months to permit affected parties to adjust their conduct to the Act's new, criminally enforceable duties. Pub. L. No. 100-679, § 6(b), 102 Stat. 4068. Thereafter, Congress delayed the effective date of the Act for an additional two months in order to allow contractors to become familiar with the new regulations implementing the Act.[39] Then, after only a brief period of effectiveness, the Procurement Integrity Act was suspended for still an additional year before finally becoming effective on December 1, 1990.[40] It is nothing short of bizarre to convert this carefully considered and twice-repeated staying of the legislative hand into a nullity by ruling that the same conduct Congress so carefully studied and legislated

---

[38] (...continued)
Oversight Hearing at 62 (Sen. Levin) ("[T]he confusion and uncertainty [over disclosure] * * * has contributed to * * * an atmosphere * * * which is intolerable and which is, frankly, unfair to you folks [the contractors] as well as to the taxpayers. You ought to know which documents can be disclosed and which ones cannot be disclosed.").

[39] See Pub. L. No. 101-28, 103 Stat. 57 (1989). See also 135 Cong. Rec. H1876 (May 15, 1989) (Rep. Conyers) ("[Regulated parties] deserve a fair chance to know the rules of the game especially when a violation of these rules carries with it severe civil penalties and prison terms."); *ibid.* (Rep. Frank) ("[t]he sole purpose here of giving an additional 60 days [is] so that people can become familiar with the regulations"); *ibid.* (Rep. Neilson) (legislation gives regulated party "60 more days to get the provisions of the rules incorporated into the organization"); 135 Cong. Rec. S5162 (May 11, 1989) (Sen. Glenn) ("both industry and government may need a little more time to study the interim regulations in order to adequately implement the law without confusion or inordinate and unreasoned concern").

[40] See Pub. L. No. 101-194 § 507(1), 103 Stat. 1759 (1989).

about was already criminalized by the general theft and fraud statutes on which this prosecution depends.

This context vividly underscores the dangers – and practical importance – of the court of appeals' expansive interpretation. A purported "custom and practice" of non-disclosure is used to establish a prohibition on disseminating information that published statutes and regulations – the ordinary sources for the government's instructions to the citizenry about prohibited conduct – fail to provide. The result is that government policy on secrecy is itself formulated in secret, free from the public inquiry, comment, and debate that accompanies legislation or public rulemaking.

3. The court of appeals' interpretation renders criminal the disclosure or obtaining of government information in a disturbingly wide variety of circumstances in which dissemination of the information is not prohibited by published statute or regulation but merely by internal government policies or practices. This regime represents a sharp departure from the historic approach to government information. That traditional understanding is reflected in Justice Stewart's description of the information-gathering "contest" between the government and the press: although the government may be understood to have internal practices or policies against disclosure of certain types of information, private parties outside the government are equally understood to be free to seek out this information and to use it if they obtain it. See Stewart, *"Or of the Press,"* 26 Hastings L.J. 631, 635-636 (1975). If Congress wishes to make simply *engaging* in the contest illegal, it must do so "through carefully drawn legislation." *Id.* at 636.

Petitioners stand convicted of ferreting out government information that was not denied them by specific regulation or statute. Although they are the first individuals whose convictions have been upheld by an appellate court on such a

basis, this new rule of law has the potential to affect, and therefore to chill the activities of, *all* individuals who obtain, or seek to obtain, government information that is subject to nondisclosure only by the government's "custom and practice" and internal policies.

Because of the importance of the issue, and because of the divergence in the lower courts on both of the steps necessary to reach the court of appeals' conclusion, review by this Court is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

JOSEPH P. COVINGTON
DANIEL MARINO
MARY BETH SULLIVAN
Seyfarth, Shaw,
Fairweather & Geraldson
Suite 500
815 Connecticut Ave., N.W.
Washington, D.C. 20006-4004
(202) 463-2400

MARK H. TUOHEY III
ARTHUR G. WYATT
Reed, Smith, Shaw & McClay
1200 18th Street, N.W.
Washington, D.C. 20036
(202) 457-6100

ANDREW L. FREY
Counsel of Record
CLIFFORD M. SLOAN
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 778-0602

DECEMBER 1992

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 91-5874

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

THOMAS D. MCAUSLAND,
Defendant-Appellant,

THE WASHINGTON POST; AMERICAN SOCIETY OF NEWSPAPER EDITORS; THE NEWSLETTER PUBLISHERS ASSOCIATION, INCORPORATED; THE RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION; THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS; AMERICAN CIVIL LIBERTIES UNION; THE NEWSPAPER GUILD; THE ELECTRONIC INDUSTRIES ASSOCIATION; WASHINGTON LEGAL FOUNDATION,
Amici Curiae.

No. 91-5875

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

CHRISTOPHER M. PAFORT,
Defendant-Appellant,

THE WASHINGTON POST; AMERICAN SOCIETY OF NEWSPAPER EDITORS; THE NEWSLETTER PUBLISHERS ASSOCIATION, INCORPORATED; THE RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION; THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS; AMERICAN CIVIL LIBERTIES UNION; THE NEWSPAPER GUILD; THE ELECTRONIC INDUSTRIES ASSOCIATION; WASHINGTON LEGAL FOUNDATION,
Amici Curiae.

Appeals from the United States District Court for the Eastern District of Virginia, Alexandria Division.

T.S. Ellis, III, District Judge.

(CR-91-101-A)

Argued: May 5, 1992

Decided: August 14, 1992

Before HALL and WILLIAMS, Circuit Judges, and WILLIAMS, Senior United States District Judge for the Western District of Virginia, sitting by designation.

Affirmed by unpublished per curiam opinion.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

OPINION

PER CURIAM:

Thomas D. McAusland ("McAusland") and Christopher M. Pafort ("Pafort") appeal their convictions of one count of conspiracy to defraud the United States and to commit substantive offenses under 18 U.S.C. § 371, one count of conversion or unauthorized conveyance of government property under 18 U.S.C. § 641, and four counts of wire fraud under 18 U.S.C. § 1343. We affirm.

I.

In 1987, McAusland and Pafort were marketing executives employed by Litton Data Systems, Inc. ("Litton"). McAusland was vice-president of marketing or business development, and Pafort was a director of business development. Both McAusland and Pafort's duties included trying to obtain new business for Litton from the United States Department of Defense ("DoD"). In carrying out these duties, McAusland and Pafort had contact with Thomas Muldoon ("Muldoon"), a private consultant hired by Litton to identify new business opportunities and to develop information on ongoing procurements. Between June, 1987 and June, 1988, Litton paid Muldoon $96,000 for his consulting services.

A brief overview of the government's procurement procedure is helpful for a full understanding of the facts of this case. The procurement process is conducted within the framework established by the Federal Acquisition Regulations ("FARs"). The process begins when the government designs a program to meet a national defense need. The contracting

agency then issues a request for proposals ("RFP"). 48 C.F.R. § 15.402 (1991). Once the proposals are submitted, the agency performs its initial evaluation, with the cost and technical components being evaluated separately. These reviews are then combined and evaluated by the contracting officer or by an advisory team. This initial evaluation determines the "competitive range" for the procurement. This range consists of the proposals "that have a reasonable chance of being selected for award." *Id.* § 15.609(a). Proposals which do not fall within this range are no longer considered. Once this initial evaluation is complete, the agency may enter into formal discussions with the remaining competitors. These remaining competitors are then invited to submit their "best and final offers" ("BAFOs"). *Id.* § 15.611. The source selection authority then decides to whom the contract will be awarded based on the recommendations of the contracting officer or advisory team.

This case involves the efforts of McAusland and Pafort to obtain procurement information between March, 1987 and June, 1988.[1] During this time, McAusland and Pafort received information from Muldoon concerning three procurements: (1) the Advanced Tactical Air Command Central ("ATACC"), a procurement for radar command and ground control system conducted by the Space and Naval Warfare Systems Command ("SPAWAR"); (2) UYQ-21, a procurement for a radar display system conducted by Naval Sea Systems Command ("NAVSEA"); and (3) Fiber Optics Cable System ("FOCS"), a procurement conducted by SPAWAR, to obtain a source for a Marine Corps fiber optic communications system.

---

[1]The conduct giving rise to the convictions occurred prior to the passage of the Procurement Integrity Act. 41 U.S.C.A. § 423 (West Supp. 1992).

1. ATACC

On April 30, 1987, SPAWAR issued the RFP on ATACC. The RFP stated that any proposals would be evaluated in four areas based on a weighted average. However, the RFP did not list the weights government evaluators would assign to each area.

Pafort was directly responsible for preparing Litton's proposal on ATACC. On July 28, 1987, Pafort spoke to Muldoon about the ATACC procurement and asked Muldoon for any information he could obtain concerning the procurement. Pafort advised Muldoon that Litton's strategy was to submit an initial bid that, while not meant to be the lowest bid, would be low enough to include Litton in the "competitive range."

Ultimately, Muldoon provided McAusland with the evaluation weights that the government would use in judging bids on ATACC. Muldoon obtained this information from Mark Saunders ("Saunders"), another private consultant, who had received the information from George Stone ("Stone"), the SPAWAR official responsible for conducting the ATACC procurement. Muldoon paid Saunders for this information.

On August 17, 1987, McAusland informed Muldoon that Litton was ready to submit its ATACC proposal. They agreed that Muldoon should not attempt to obtain copies of all the competitor's technical proposals. McAusland stated that to do so would be "playing with fire." The two agreed to wait until after the government had examined the initial proposals to determine whether Muldoon needed to obtain a particular competitor's proposal.

Muldoon told Pafort about McAusland's decision not to obtain copies of all the technical proposals. Muldoon stated that he would not obtain a competitor's proposal unless

a proposal contained a design that Litton would want to "steal."

On August 21, 1987, Pafort asked Muldoon how soon he would have the information about the competitors' bids. Later, McAusland told Muldoon that Muldoon could sell the information to another competitor if Litton did not have a chance of getting the contract.

On September 24, 1987, Saunders told Muldoon that he did not expect to obtain any information on ATACC in the near future. However, Saunders stated he might be able to learn where Litton stood in comparison with the other companies. Muldoon then told Pafort that he had asked his source to find out where Litton stood. Muldoon said that if he obtained this information, Pafort should come to Washington rather than discussing it on the telephone. Pafort agreed.

On September 29, Stone told Saunders what each competitor in the ATACC procurement had bid. Stone also told Saunders that Litton's bid had been the highest and was not in the competitive range.

Saunders then told Muldoon that Litton had submitted the highest bid and told Muldoon the price Stone had quoted as being Litton's. Saunders also told Muldoon that Litton would be eliminated before the next stage of the competition.

On October 1,1987, Muldoon gave this information to McAusland. McAusland verified that Muldoon had accurately reported Litton's bid and agreed that Muldoon's other information was probably correct. Muldoon advised McAusland not to send a letter withdrawing Litton's bid because Litton was not supposed to know that it would be eliminated. McAusland agreed.

Between October and March, 1988, SPAWAR continued the evaluation process of the initial ATACC

proposals. During this period, Pafort asked Muldoon for the latest information on ATACC. Pafort said he was interested because Litton had invested $1 million in its ATACC effort. In February, Pafort said he would like to see the ranking of the competitors, which Muldoon indicated he had obtained from his source. Muldoon had obtained them from Saunders who had, in turn, obtained them from Stone.

SPAWAR officials concluded their evaluation process in February, 1988. In March, 1988, they notified four companies that they were in the competitive range and would continue in the competition, while advising Litton and others that they were being eliminated. The contract was ultimately awarded to Grumman Systems for approximately $95 million.

2. UYQ-21

In June, 1987, Litton, Raytheon and SAIC submitted bids to NAVSEA for the UYQ-21 contract. On August 19 and 20, 1987, government officials gave final approval to the evaluators' recommendation to award the contract to Raytheon without requesting any BAFOs. Prior to these final approvals, McAusland and Pafort spoke to Muldoon about the procurement on several occasions.

Muldoon knew Jerry Manning ("Manning"), who was on the government cost review team evaluating the proposals. Muldoon told Manning that Litton had obtained copies of all the competitors' proposals. Muldoon showed Manning a list of dollar amounts, which Manning confirmed as being the figures from each of the UYQ-21 price proposals. On July 29, 1987, Manning also told Muldoon that Litton would have to revise its cost proposal if the company was going to win the contract at the BAFO stage.

On July 29, 1987, Muldoon told McAusland that Muldoon had copies of the government's evaluations of the UYQ-21 price proposals. McAusland telephoned George

Miller, another Litton executive, and told Miller he would bring the pricing evaluations to Litton's offices.

On July 31, 1987, Muldoon advised McAusland that Muldoon had left a document at Litton's Virginia office that "looked good." McAusland said that he had instructed a secretary to send the document to him via express mail. Muldoon also referred to information contained in the document, which corresponded to information contained in the government's Source Selection Plan for the UYQ-21 procurement. Manning had given this document to Muldoon.

In August, 1987, Muldoon told McAusland and Pafort that the Navy would probably award the contract without requesting BAFOs. Muldoon told Pafort and McAusland that, after the initial evaluations, Litton was second behind Raytheon in the bidding. Muldoon learned this from Manning.

In July and August, 1987, Muldoon also told McAusland that Muldoon had a contact, identified as a government official, who could ensure a request for BAFOs on the UYQ-21 if Litton came up with some money. McAusland asked if Litton could win the contract if the Navy asked for BAFOs. Muldoon advised McAusland that Raytheon had ranked substantially better in the initial evaluation. McAusland asked if Muldoon could obtain the technical evaluations before Litton would have to submit its BAFO. Muldoon did not think that he could. McAusland then indicated that he did not want to pursue this course of action. The Navy awarded the contract to Raytheon for approximately $47 million.

3. FOCS

In December, 1987, Muldoon provided McAusland with a copy of the draft of the government's Acquisition Plan for the procurement. In early 1988, Pafort told Muldoon that Litton was interested in the program and asked Muldoon to check on the proposed date the government was going to issue a RFP on the project. Subsequently, when the RFP was released, Litton did not submit an offer on the FOCS plan.

Defendants also challenge the trial court's denial of their motion for a mistrial. On June 14, 1991, while Defendants' trial was in progress, the government issued a press release concerning the guilty plea of former Assistant Secretary of the Navy, Melvin Paisley ("Paisley"). Paisley pled guilty as a result of a fraud investigation known as "Operation Ill Wind" which involved bid rigging and government contracts. News stories concerning the plea appeared on that evening's television news and in the newspaper the following day. Defendants moved for a mistrial based on the publicity. The district court questioned the jury concerning the Paisley plea. Although members of the jury had seen the television news and newspaper article, each juror stated he or she could render an impartial decision. The district court then permitted the trial to continue.

II.

Section 641 punishes an individual who "embezzles, steals, purloins, or knowingly converts to his use or the use of another, or *without authority*, sells, conveys or disposes of any record, voucher, money or thing of value[2] of the United States ...." 18 U.S.C. § 641 (emphasis added). Defendants

---

[2]This circuit has recognized that information, such as that involved in this case, is a "thing of value" under section 641. *United States v. Fowler*, 932 F.2d 306 (4th Cir. 1991).

contend that, standing alone, the phrase "without authority" is devoid of meaning and that it must derive its meaning from "other, more particular, prohibitions against disclosure" established by "federal statutes [or] administrative rules and regulations." *United States v. Lambert*, 446 F.Supp. 890, 899 (D. Conn. 1978), *aff'd sub nom. United States v. Girard*, 601 F.2d 69 (2d Cir.), *cert. denied*, 444 U.S. 871 (1979).

Specifically, Defendants contend that they can be convicted of information theft under section 641 only if disclosure of the information was clearly prohibited by published FARs. Defendants assert that, without specific FARs prohibiting disclosure, section 641 violates the Due Process Clause as applied to the conduct at issue because the statute is unconstitutionally vague. Defendants assert that this same argument prohibits their convictions under sections 371 and 1343. We disagree.

Defendants cite two primary cases for the proposition that they can be convicted under section 641 only if disclosure of the information was prohibited by specific published regulations: *United States v. Girard*, 601 F.2d 69 (2d Cir.), *cert. denied*, 444 U.S. 871 (1979), and *United States v. Morison*, 844 F.2d 1057 (4th Cir.), *cert. denied*, 488 U.S. 908 (1988). Labelling their argument as the *"Girard - Morison"* rule, Defendants assert that the case was prosecuted under a legally defective theory.

In *Girard*, defendants were convicted under section 641 of selling the names of Drug Enforcement Agency ("DEA") informants obtained from the DEA's computerized files. Defendants challenged their convictions on the ground that section 641 was vague and overbroad. *Girard*, 601 F.2d at 71. The court concluded that the defendants must have known that the sale of this information was prohibited. The court noted that the DEA's own rules and regulations forbid such disclosure. The court stated that these rules "*may* be

considered as both a delimitation and a clarification of the conduct proscribed" under section 641. *Id.* (emphasis added). Therefore, the court concluded that section 641 was not vague or overbroad as applied to the defendants. *Id.* at 71-72.

In *Morison*, defendant was convicted under the Espionage Act, 18 U.S.C. § 793(d) and (e), for the unauthorized transmittal of certain satellite secured photographs of Soviet naval preparation to "one not entitled to receive them."[3] Defendant challenged his conviction under 18 U.S.C. § 793(d) and (e) on the grounds that the statute was vague and overbroad. However, the court found that the defendant was familiar with the regulations governing disclosure of the information. The court followed *Girard* and stated that the statutes "*can* be limited and clarified by the Classification Regulations and, so limited and clarified, are not vague." *Morison*, 844 F.2d at 1075 (emphasis added).

We do not read these decisions as requiring the disclosure to be specifically proscribed by published regulations. While we agree that the existence of a published regulation proscribing disclosure certainly prevents the statute from being vague as applied, we do not believe it is the exclusive method of preventing vagueness. *See United States v. Jones*, 677 F. Supp. 238, 241 (S.D.N.Y. 1988) (knowledge of lack of authority shown through defendant's knowledge of the "government's longstanding practice" of confidentiality). Thus, we hold that the disclosure of the procurement information need not have been proscribed by published FARs in order to prevent section 641 from being vague as applied.

---

[3]Defendant was also convicted under section 641. However, the court did not address whether this section was vague as applied to the defendant.

Defendants concede that, if the Court rejects the *Girard - Morison* rule, their remaining arguments on this issue will similarly fall. We agree and address their remaining points briefly.

Defendants assert that rejection of the *Girard - Morison* theory renders section 641 vague as applied to the conduct at issue. The Due Process Clause requires that laws "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly" and provide "explicit standards for those that apply them." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). Here, Defendants assert that section 641 is vague as applied rather than vague on its face. Such a challenge "must be examined in the light of the facts of the case at hand." *United States v. Mazurie*, 419 U.S. 544, 550 (1975).

The government has cited several categories of evidence to show that disclosure was without authority and that Defendants knew as much. The government cites published regulations which were in effect at the time of the relevant conduct and prohibited disclosure of information in the proposals. 48 C.F.R. §§ 15.413-1(a), 15.610(d), 15.612(e) (1987). The government also cites unpublished DoD regulations, which are available through the Freedom of Information Act, that forbid disclosure. DoD Directive 4105.62(E)(3)(c).[4] Many of the documents obtained by

---

[4]This provides:

> To ensure fairness in the source selection process, evaluation criteria and their relative importance must flow from the statement of work and must be furnished to all potential offerors in the solicitation. The relative importance of the evaluation criteria will be indicated in the solicitation. However, when numerical weights are

Litton contained legends restricting disclosure, which a panel of this Court recently found relevant in considering whether an individual had fair notice that his conduct was proscribed by law. *United States v. Caso*, No. 90-5830 (4th Cir. June 14, 1991) (unpublished). Defendants' behavior and conduct also indicated that they knew the disclosure was without authority. For example, McAusland agreed that he should not write a letter withdrawing Litton's ATACC bid because he was not supposed to know where Litton stood in the competition. He also agreed that having Muldoon get all of the ATACC competitors bids would be "playing with fire." Pafort agreed to travel to meet Muldoon in order to avoid discussing certain information over the phone. At trial, Pafort testified that he would not ask for rankings and technical evaluations of competitors because that "was not the correct thing to do." This is a relevant consideration. *Id.* Stone and Manning testified to their lack of authority to disclosure the information. Other procurement officials testified that Defendants, in light of their experience and positions, would have known that the information was not to be disclosed.[5]

In light of the above, we hold that the statute was not unconstitutionally vague as applied to Defendants' behavior. Also, we hold that "in view of the statute's plainly legitimate sweep in regulating conduct, it is not so substantially overbroad that any overbreadth that may exist cannot be

---

> applied by the SSA or SSAC [(Source Selection Advisory Counsel)], such weights will not be disclosed either to offerors or to evaluators other than the SSAC, to preclude intentional or unintentional bias in proposals or evaluations.

[5]This testimony was proper as held by this court in *Fowler*, 932 F.2d at 312.

cured on a case by case basis." *Girard*, 601 F.2d at 72; *see also United States v. Jeter*, 775 F.2d 670, 682 (6th Cir. 1985), *cert. denied*, 475 U.S. 1142 (1986) (rejecting claim that section 641 was overbroad).

Defendants also challenge the district court's jury instructions. Defendants claim the trial court erred in refusing to give an instruction: (1) requiring the jury to find that Defendants "knew that the information ... was released without authority in violation of [federal acquisition] regulations" (App. at 167); and (2) concerning Defendants' receipt of the determination that Litton's ATACC proposal was unacceptable (App. at 168). When considering a challenge to jury instructions, the inquiry on appeal is limited to "whether, taken as a whole, the instruction fairly states the controlling law." *United States v. Cobb*, 905 F.2d 784, 789 (4th Cir. 1990), *cert. denied*, 111 S. Ct. 758 (1991). The validity of both these instructions hinges on the Court's acceptance of the "*Girard - Morison*" rule. Since we have declined to accept this rule, these arguments must similarly fall.

III.

Defendants assert that the district court erred in denying their motions for mistrial based on the publicity surrounding the Paisley plea. The threshold question in addressing a claim of in-trial publicity "is whether the publicity rises to the level of substantial prejudicial material." *United States v. Jones*, 542 F.2d 186, 194 (4th Cir.), *cert. denied*, 426 U.S. 922 (1976). If the publicity rises to this level, the court must "ascertain the extent and effect of the infection, and thereafter, in its sound discretion, take appropriate measures to assure a fair trial." *United States v. Hankish*, 502 F.2d 71, 77 (4th Cir. 1974). If the publicity does not reach this level, the court need not take the

precautions mandated by *Hankish*, including granting a mistrial. *Jones*, 542 F.2d at 194.

Here, the publicity was not substantially prejudicial. "Information is prejudicial if it is substantially adverse to the defendant, has not been presented to the trial jury in court and is not properly admissible in the trial." *United States v. Gray*, 788 F.2d 1031, 1033 (4th Cir. 1986). Defendants have failed to meet this standard. Paisley was not a co-defendant, nor was he involved in any of the acts charged against Defendants. Therefore, the court did not err in denying the mistrial.

IV.

Defendants assert that the district court erred in denying their motion *in limine* to exclude evidence of the guilty pleas and plea agreements of the two procurement officials who disclosed the information specified in the indictment from the prosecution's case-in-chief. However, we find that this issue is controlled by *United States v. Henderson*, 717 F.2d 135, 137 (4th Cir. 1983), *cert. denied*, 465 U.S. 1009 (1984) and affirm the district court's decision.

V.

For the foregoing reasons, we find that the district court committed no error. We therefore affirm.

AFFIRMED

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Nos. 91-5874, 91-5874

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

THOMAS D. McAUSLAND and
CHRISTOPHER M. PAFORT,
Defendants-Appellants

ORDER

[Filed October 1, 1992]

This case is before the court on the petition for rehearing; the court, having considered briefs in support of rehearing and in opposition, it is **ADJUDGED** and **ORDERED** that the petition for rehearing is **DENIED** and no member of the panel requesting a poll of the court on the suggestion for rehearing *en banc*.

Upon further consideration, it is hereby **ADJUDGED** and **ORDERED** that the Clerk shall change this opinion from UNPUBLISHED to PUBLISHED, with the following corrections:

On page 1, delete "affirmed by unpublished per curiam opinion" and in lieu thereof, insert "affirmed by published opinion, Judge Glen M. Williams wrote the opinion of the court in which Judges Hall and Karen Williams concurred."

On page 2, delete the phrase stating "unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6;" also delete the words "per curiam" and insert in lieu thereof "opinion by Glen M. Williams, Senior United States District Judge."

The Clerk shall furnish copies of this Order to counsel and to all active judges of this circuit.

ENTER: This 28th day of September 1992.

/s/ Glen M. Williams
Senior United States
District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Nos. 91-5874(L)
(CR-91-101-A)

United States of America,
Plaintiff-Appellee,

v.

Thomas D. McAusland, Et Al,
Defendants-Appellants.

ORDER

[Filed October 27, 1992]

The Court amends its opinion filed August 14, 1992, as follows:

On the cover sheet, section 1 -- the status is changed from "unpublished" to *published."*

On page 2, section 5 -- the status is changed to read "Affirmed by *published opinion. Senior Judge Williams wrote the opinion, in which Judge Hall and Judge Williams joined."*

On page 3 -- the section dealing with use of unpublished opinions as precedent is deleted.

On page 3, line 1 of the opinion -- "per curiam" is corrected to read *"WILLIAMS, Senior District Judge."*

On page 13, third full paragraph, line 7 -- a comma is added after "(1984)."

For the Court - By Direction

/s/ Bert M. Montague
Clerk

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

(CR 91-101-A)

UNITED STATES OF AMERICA

v.

THOMAS D. McAUSLAND and
CHRISTOPHER M. PAFORT, Defendants.

District Court Decision Denying
Motion to Dismiss Indictment
(May 9, 1991)

[EXCERPTS OF PROCEEDINGS]*

THE COURT: Under 641, I think there is no longer any question, given the Fourth Circuit's opinion in this circuit, that information is a species of property and a thing of value under 641. And 641 -- that's, of course, the Fourth Circuit said that in the [*Fowler*] opinion, which came down only a week or so ago.

* * *

The motion to dimiss the indictment based on the vagueness/overbreadth, as applied -- or even on its face, or as applied -- the Fifth Amendment and First Amendment arguments are really a step beyond the Ill Wind cases that

---

*The reprinted excerpts are from the May 9, 1991 transcript of proceedings at p. 7 and pp. 50-52.

have been tried so far because, as the Court reads it, 641 has not been applied in this context.

The arguments were interesting. And it's important for the Court to decide this issue first because a granting of this motion ends the prosecution. Accordingly, the Court took this matter up first. At least it ends this part of it.

And the Court concludes, after review of the record and the arguments, that the motion to dismiss the indictment must be denied. The Court focused chiefly on the language "without authority." And it really is a jury issue on whether the disclosure was without authorization and whether defendants knew that.

The Court doesn't -- it concludes there's really no First Amendment problem on the indictment. There might be on other facts in this context, but not on the indictment as it's pled.

As far as the Fifth Amendment and the intersection of the First and Fifth Amendment, the defendants argue that that's really all that Judge Winter was saying: is that when there is this intersection and in this context where government information is involved under 641, that caution has to be exercised.

I think that probably is a reasonable reading of the Winter opinion. And that certainly is a -- that caution certainly survives.

What is clear now after the Fourth Circuit's recent decision in *Fowler* is that the theft of government information is clearly covered under 641.

The Court doesn't really reach the issue whether you don't have to have any custom or any rule or any regulation because, indeed, the government has and has cited specific regulations, instructions, and intends to show custom and

practice and acknowledges that it must show that the defendants knew that the disclosure was without authorization in order to make out the 641 violation.

And the Court concludes that it simply isn't -- the detailed indictment taken together with the language of 641 is not constitutionally infirm and, therefore, denies the motion and declines the invitation for a supplemental evidentiary hearing.

APPENDIX E

THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

(CRIMINAL NO. 91-101-A)

THE UNITED STATES OF AMERICA, Plaintiff,

v.

THOMAS D. McAUSLAND, and,
CHRISTOPHER M. PAFORT, Defendants.

Alexandria, Virginia
August 23, 1991

[EXCERPT OF PROCEEDINGS]

* * * * * *

THE COURT: It is painfully obvious, I'm sure, to counsel in the case that the Court finds this a troublesome area. It's a troublesome area because it's a novel area. No case is directly in point. No case is itself entirely nourishing. And the Court is not going to go through a lengthy recitation of it, but, in essence, the Court concludes ultimately that the motion for judgment of acquittal and new trial must be denied.

It's a very close question in the Court's mind on the due process issue. The Court concludes that there was evidence from which a jury could find beyond a reasonable doubt, as I've ruled on the motion for judgment of acquittal, each and every elements of the offenses charged.

I'll summarize briefly that the defendants sought procurement sensitive information that they -- it was not

authorized and that they knew was not authorized to be disclosed. There was evidence from which the jury could find that they sought and received procurement sensitive information from Mr. Muldoon, and that procurement sensitive information was not authorized to be released. There was also evidence from which the jury could find that the defendants knew it was not authorized to be released.

The due process point ultimately the Court resolves against the defendants here with a fair warning. I think the argument was very well made by the defendants, and it will not surprise the Court if that argument ultimately is vindicated on appeal.

APPENDIX F

18 U.S.C. § 371 provides:

§ 371. Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the Untied States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

18 U.S.C. § 641 provides:

§ 641. Public money, property or records

Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States or of any department or agency thereof, or any property made or being made under contract for the United States or any department or agency thereof; or

Whoever receives, conceals, or retains the same with intent to convert it to his use or gain, knowing it to have been embezzled, stolen, purloined or converted --

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both; but if the value of such property does not exceed the sum of $100, he shall be fined

not more than $1,000 or imprisoned not more than one year, or both.

The word "value" means face, par, or market value, or cost price, either wholesale or retail, whichever is greater.

18 U.S.C. § 1343 provides:

§ 1343. Fraud by wire, radio, or television

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than five years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

Supreme Court, U.S.
FILED
JAN 6 1993
OFFICE OF THE CLERK

No. 92-960

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

THOMAS D. McAUSLAND
and CHRISTOPHER PAFORT,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

DANIEL J. POPEO
RICHARD A. SAMP
(Counsel of Record)
WASHINGTON LEGAL
FOUNDATION
1705 N Street, NW
Washington, DC 20036
(202) 857-0240

Date: January 6, 1993

QUESTION PRESENTED

Whether a private citizen who obtains unclassified government information may be convicted of theft of government property (18 U.S.C. § 641) or wire fraud (18 U.S.C. § 1343) where disclosure of the information, although not prohibited by statute or published regulation, violates internal government rules, custom, or practice.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iv

INTEREST OF *AMICUS CURIAE* 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE PETITION . . . 3

I. SECTION 641's "WITHOUT AUTHORITY" LANGUAGE HAS NEVER BEEN INTERPRETED AS PROHIBITING ALL DISCLOSURES OF GOVERNMENT INFORMATION EXCEPT FOR THOSE WITH EXPLICIT AUTHORIZATION 6

A. Disclosure Is Not "Without Authority" Unless It Violates a Federal Regulation or Law (Other Than § 641) That Explicitly Prohibits Disclosure 6

B. Protection of Commercial Speech Rights Requires That § 641 Be Found Inapplicable to the Facts of This Case 10

II. THE APPLICATION OF § 641 (AS CONSTRUED BY THE FOURTH CIRCUIT) TO PETITIONERS VIOLATES THEIR DUE PROCESS RIGHTS 12

CONCLUSION 16

TABLE OF AUTHORITIES

Cases **Page**

Board of Trustees of the State University of New York v. Fox, 109 S. Ct. 3028 (1989) 12
Chappell v. United States, 270 F.2d 274 (9th Cir. 1959) 3
Edward J. DeBartolo Corp. v. Florida Gulf Coast Building and Construction Trades Council, 108 S. Ct. 1392 (1988) 13
Grayned v. City of Rockford, 408 U.S. 104 (1972) 13-14
Kolender v. Lawson, 461 U.S. 352 (1983) 15-16
Morissette v. United States, 342 U.S. 246 (1952) 6
New York Times Co. v. Sullivan, 376 U.S. 254 (1964) 12
Peel v. Attorney Registration and Disciplinary Commission of Illinois, 110 S. Ct. 2281 (1990) 4
Smith v. Goguen, 415 U.S. 566 (1974) 15
United States v. Fowler, 932 F.2d 306 (4th Cir. 1991) 4, 6, 7
United States v. Girard, 601 F.2d 69 (2d Cir.), *cert. denied*, 444 U.S. 871 (1979) . . 4, 7, 10-13
United States v. Jeter, 775 F.2d 670 (6th Cir. 1985) 4, 7, 10
United States v. Lambert, 446 F. Supp. 890 (D. Conn. 1978), *aff'd sub nom. United States v. Girard*, 601 F.2d 69 (2d Cir.), *cert. denied*, 444 U.S. 871 (1979) . . . . . *passim*
United States v. Morison, 844 F.2d 1057 (4th Cir.), *cert. denied*, 488 U.S. 908 (1988) 7
United States v. Tobias, 836 F.2d 449 (9th Cir.), *cert. denied*, 485 U.S. 991 (1988) 3
United States v. Truong Dinh Hung, 629 F.2d 908 (4th Cir. 1980), *cert. denied*, 454 U.S. 1144 (1982) 10

Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976) 11

Constitutional and Statutory Materials

U.S. Constitution, amend. 1 . . . . . 4, 5, 10-14

U.S. Constitution, amend. 5 13

U.S. Constitution, amend. 14 13

Federal Procurement Policy Act Amendments of 1988 (the "Procurement Integrity Act") 8-9, 11, 13

18 U.S.C. § 371 3

18 U.S.C. § 641 . . . . . *passim*

18 U.S.C. § 1343 3

41 U.S.C. § 423(a) 9

Regulations

48 C.F.R. § 5.401(b)(1) (1987) 8
48 C.F.R. § 15.413-1(b) (1987) 8
48 C.F.R. § 15.1001(a) (1987) 8

Other Authorities

H.R. Rep. No. 911, 100th Cong., 2d Sess. (1988) . 9

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1992

No. 92-960

THOMAS D. McAUSLAND
and CHRISTOPHER PAFORT,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF OF THE WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICUS CURIAE*

The Washington Legal Foundation (WLF) is a pro-free enterprise public interest law and policy center with more than 100,000 members and supporters nationwide. While WLF engages in litigation and the administrative process in a variety of areas, WLF devotes a substantial portion of its resources to promoting the rights of individuals and corporations to conduct their business affairs unfettered by unwarranted governmental interference. WLF believes that the best interests of the American free-enterprise system are advanced when government keeps to an absolute minimum its interference

with the free flow of commercial and noncommercial information; accordingly, WLF has appeared before this Court as well as other state and federal courts in support of broad commercial speech rights. *See, e.g., City of Cincinnati v. Discovery Network, Inc.*, No. 91-1200, *cert. granted*, 112 S. Ct. 1290 (1992); *Peel v. Attorney Registration and Disciplinary Commission of Illinois*, 110 S.Ct. 2281 (1990).

At the same time, WLF recognizes that the public interest at times demands that the government restrict the free flow of information and that the government may impose criminal penalties on those who violate clearly spelled-out prohibitions against the release of information. For example, WLF filed a brief in *United States v. Morison,* 844 F.2d 1057 (4th Cir.), *cert. denied,* 488 U.S. 908 (1988), seeking affirmance of the criminal sanctions imposed in that case. However, WLF believes strongly that no one should face criminal sanctions for divulging or receiving commercial information in the absence of an explicit government prohibition against such activity. Accordingly, WLF filed a brief in support of Petitioners in the court below and does so again in support of the Petition for Writ of Certiorari.

WLF believes that its experience in litigating issues of this sort may prove of assistance to the Court in its consideration of this Petition. WLF submits this brief in support of Petitioners with the written consent of all parties. The written consents are on file with the Clerk of the Court.

STATEMENT OF THE CASE

In the interests of judicial economy, WLF hereby adopts by reference the Statement contained in the Petition for Writ of Certiorari.

In brief, Petitioners Thomas McAusland and Christopher Pafort stand convicted of receiving from the federal government unclassified information that could

have been helpful to their employer, Litton Data Systems, Inc. ("Litton"), in obtaining certain defense contracts. At the time of the actions in question (1987-88), no federal law or regulation explicitly forbade conveying or receiving the information obtained by Petitioners. Moreover, they did not use any illicit means to obtain the information, *e.g.*, stealing documents from locked files or bribing government officials.

Nonetheless, Petitioners' attempts to obtain this information led to their conviction under criminal statutes that prohibit theft of government property (18 U.S.C. § 641), wire fraud (18 U.S.C. § 1343), and conspiracy (18 U.S.C. § 371). None of those three statutes explicitly addresses efforts to obtain government information. Section 641 makes it a criminal act knowingly to convert "without authority" any "thing of value of the United States." Section 1343 prohibits use of interstate wire communications as part of a scheme to defraud. Section 371 prohibits conspiracies to violate federal law. In sum, the legitimacy of Petitioners' convictions boils down to whether a law that forbids converting government property "without authority" may properly be applied to the transfer of unclassified government information, even when no regulation or other federal law explicitly prohibits such transfers.

REASONS FOR GRANTING THE PETITION

This case raises an issue of exceptional importance -- the circumstances under which the government may impose criminal liability on a private citizen for the receipt of government information. The courts of appeals are split regarding whether government information can *ever* qualify as "a thing of value of the United States" whose improper receipt is prohibited under § 641. The Ninth Circuit has long held that "section 641 should not be read to apply to intangible goods" such as government information. *United States v. Tobias*, 836 F.2d 449, 451 (9th Cir.), *cert. denied*, 485 U.S. 991 (1988); *Chappell v. United States*, 270 F.2d 274, 276 (9th Cir. 1959). The Fourth Circuit is

one of three courts of appeals that have reached the opposite conclusion -- that government information *does* fall within the purview of § 641. *United States v. Fowler*, 932 F.2d 306, 309-310 (4th Cir. 1991).[1]

Regardless how one comes out on the issue, the continued existence of the circuit split places an intolerable burden on First Amendment rights. The right to convey and receive government information (actions that undoubtedly qualify for some degree of First Amendment protection) now depends on the fortuity of where within the United States one happens to live. This Court has rightly condemned such state-to-state disparities in First Amendment protection.[2] Accordingly, the Court should grant certiorari to resolve the inter-circuit conflict.

However, WLF's desire to encourage the Court to resolve that conflict was not the motivating factor in WLF's decision to file this brief. Rather, WLF is filing primarily because this prosecution expands statutes governing receipt of government property far beyond anything contemplated by Congress in adopting the statutes and far beyond what individuals reading the statutes could have anticipated. WLF encourages the Court to hear this case in order to reaffirm the principle that no one should be held criminally accountable for his conduct unless he has first been given clear notice that the conduct is prohibited; that principle applies particularly strongly

---

[1] *See also United States v. Jeter*, 775 F.2d 670, 680 (6th Cir. 1985), *cert. denied*, 475 U.S. 1142 (1986); *United States v. Girard*, 601 F.2d 69, 70-71 (2d Cir.), *cert. denied*, 444 U.S. 871 (1979).

[2] *See, e.g., Peel v. Attorney Registration and Disciplinary Commission of Illinois*, 110 S. Ct. 2281, 2291 n.16 (1990) (criticizing suggestion that the Court should allow Illinois to prohibit attorneys from listing professional certifications on their letterhead, while simultaneously deferring to rulings of Alabama and Minnesota supreme courts that First Amendment bars such prohibitions, because it "would create radical disparities in First Amendment protections from State to State").

when, as here, the prosecution implicates First Amendment values.

Prior cases construing § 641 have uniformly held that transfers of unclassified government information are not deemed to be "without authority" -- and thus in violation of § 641 -- unless a formal regulation or some other federal law explicitly prohibits such transfers. In this case, no formal regulation or federal law (other than § 641) explicitly prohibited Petitioners from receiving the procurement information at issue here. Accordingly, the Court should grant the writ of certiorari to make clear that the interpretation of § 641 espoused by the government in this case and adopted by the Fourth Circuit impermissibly broadens that statute.

A § 641 conviction is particularly inappropriate in this case, where Petitioners stand convicted of conduct that enjoys considerable First Amendment commercial speech protection. While Congress may constitutionally prohibit the receipt of procurement-sensitive government information (and it did so when it adopted the Procurement Integrity Act), this Court should not lightly assume that Congress would criminalize the receipt of such information *sub silentio* as part of a law (§ 641) directed against the theft of government property in general, particularly in view of the substantial First Amendment protection traditionally afforded to such commercial speech activity.

Were the Court to construe § 641 as urged by the government, then the statute would be unconstitutionally vague as applied to Petitioners. A criminal law is void for vagueness if it either: (1) fails to give a person of ordinary intelligence a reasonable opportunity to know what is prohibited; or (2) impermissibly delegates to law enforcement officials and juries decisions regarding how the law is to be enforced. The interpretation of § 641 being urged by the government fails on both scores. Rather than construing § 641 in a manner that will render the law unconstitutionally vague as applied to Petitioners,

the Court should grant certiorari and construe § 641 so as to leave Petitioners' conduct outside the scope of that law.

I. SECTION 641's "WITHOUT AUTHORITY" LANGUAGE HAS NEVER BEEN INTERPRETED AS PROHIBITING ALL DISCLOSURES OF GOVERNMENT INFORMATION EXCEPT FOR THOSE WITH EXPLICIT AUTHORIZATION

A. Disclosure Is Not "Without Authority" Unless It Violates a Federal Regulation or Law (Other Than § 641) That Explicitly Prohibits Disclosure

Although Section 641 has been a part of the federal criminal code for some time,[3] only in recent years has the government attempted to apply the statute to the taking of intangible government property, such as information. As noted above, the Fourth Circuit in this case (and previously in *Fowler*) joined two other courts of appeals in holding that § 641 may properly be so applied.

Nonetheless, prior to this case no court had ever construed § 641's "without authority" language as prohibiting all disclosures of government information except in those instances in which disclosure has been explicitly authorized. Such a construction is unsupported by the statute's legislative history and presents clear First Amendment problems by purporting to criminalize speech disclosing information of public interest that the government has no reason to keep secret. Thus, for example, in *United States v. Lambert*, 446 F. Supp. 890 (D. Conn. 1978), *aff'd sub nom, United States v. Girard*, 601 F.2d 69 (2d Cir.), *cert. denied*, 444 U.S. 871 (1979),

---

[3] Section 641 first appeared in its current form in 1948 as a recodification of several earlier criminal statutes. "[I]t was to apply to acts which constituted larceny or embezzlement at common law and also acts which shade into those crimes but which, most strictly considered, might not be found to fit their fixed definitions." *Morissette v. United States*, 342 U.S. 246, 268 n.28 (1952).

the court required the government in a § 641 prosecution to demonstrate that disclosure of the information at issue was "affirmatively prohibited by other federal statutes, administrative rules and regulations, or, perhaps, longstanding government practices." *Id.* at 899.

Contrary to the government's contention before the court of appeals, nothing in subsequent court of appeals decisions (prior to this case) undercuts the limiting construction given to § 641 by *Lambert*. While the Second Circuit, in affirming *Lambert*, declined to consider the defendants' vagueness and overbreadth challenges, it termed the district court's opinion -- including the district court's construction of § 641 -- "well-reasoned." *United States v. Girard*, 601 F.2d 69, 70 (2d Cir.), *cert. denied*, 444 U.S. 871 (1979). The case upon which the government principally relied, *United States v. Jeter*, 775 F.2d 670, 682 (6th Cir. 1985), stated that it was "follow[ing] the lead of *Girard*" in declining to consider the defendant's vagueness and overbreadth challenges, but nowhere did the opinion suggest that either *Lambert*'s or *Girard*'s construction of § 641 was inaccurate.[4] Moreover, the Fourth Circuit's decision in *United States v. Morison*, 844 F.2d 1057 (4th Cir.), *cert. denied*, 488 U.S. 908 (1988), while not explicitly relying on *Lambert*'s limiting construction of § 641, upheld the defendant's conviction in the face of an as-applied vagueness challenge to § 641 solely because national security regulations known to the defendant -- which explicitly prohibited disclosure of the documents at issue in that case -- eliminated any doubt regarding whether the defendant's release of documents was "without authority."

---

[4] *Jeter* merely held -- in accord with *Lambert* and *Girard* -- that § 641 extends to unauthorized conversion of *intangible* property, including government information. *Jeter*, 775 F.2d at 682. *Jeter* had no cause to consider when a conversion can be said to be "without authority" within the meaning of § 641. *Fowler* explicitly followed both *Girard* and *Jeter* in holding that § 641 extends to unauthorized conversion of intangible property, but -- like *Jeter* -- did not consider the scope of § 641's "without authority" language.

Under *Lambert*'s construction of § 641, Appellants' conviction cannot stand, and thus the Fourth Circuit's decision is squarely in conflict with *Lambert*. Construing the evidence at trial in the light most favorable to the government, McAusland and Pafort received the following information in 1987-88 regarding defense procurement projects: (1) advance word that Litton's proposal for the Advanced Tactical Air Command Central ("ATACC"), a procurement for a radar command and control system, was unacceptable; (2) the government's source selection plan and price evaluations for UYQ-21, a procurement for a second supplier of a radar display system; and (3) the government's acquisition plan for FOCS, a procurement to obtain a source for a Marine Corp fiber optic communications system. No then-existing federal law or Federal Acquisition Regulation ("FAR") prohibited the release of that information.

To the contrary, then-existing FARs made all procurement information presumptively releasable. *See* 48 C.F.R. § 5.401(b)(1) (1987) (contracting officers are authorized to "make available maximum information to the public, except information . . . [o]n plans that would provide undue or discriminatory advantage to private or personal interests"); 48 C.F.R. § 15.413-1(b) (1987) ("general information that is not prejudicial to others may be furnished upon request"). Indeed, 1987 FARs *required* that Litton be informed immediately that its ATACC proposal had been deemed unacceptable. *See* 48 C.F.R. § 15.1001(a) (1987) ("the contracting officer, upon determination that a proposal is unacceptable, *shall* promptly notify the offeror") (emphasis added).

In response to alleged abuses in the government contracting system, Congress adopted the Federal Procurement Policy Act Amendments of 1988 (the "Procurement Integrity Act"), which explicitly forbids any representative of a government contractor from attempting to obtain from government officials prior to the award of a contract any "proprietary" or "source selection

information" regarding a procurement. 41 U.S.C. § 423(a). The Procurement Integrity Act for the first time provides precise definitions for the terms "proprietary information" and "source selection information"; those definitions make clear that Petitioners are now forbidden to seek the types of information they obtained in 1987-88, prior to adoption of the Act. That Congress's stated purpose in adopting the Act was to fill a void in existing procurement laws (*see* H.R. Rep. No. 911, 100th Cong., 2d Sess. 19-20 (1988)) only strengthens the argument that § 641 was never intended to criminalize the receipt of unclassified procurement information.

Lambert opined that "perhaps" one could be prosecuted under § 641 for the receipt of government information if such receipt were prohibited by "longstanding government practices." *Lambert*, 446 F. Supp. at 899. However, this Court need not consider here whether such a prosecution would meet requisite due process standards because the permissive 1987-88 FARs -- which encouraged the free flow of information to contractors -- defeat any claim the government could make of an unambiguous "longstanding" practice forbidding receipt of the types of information received by Petitioners. The existence of FARs making clear that contracting officers had wide discretion to release procurement information meant that government contractors could reasonably believe that any information they received had been properly released.

In sum, § 641 case law prior to the decision below made clear that no § 641 conviction could be sustained in the absence of any law or publicly disclosed regulation explicitly prohibiting receipt of the types of information obtained by Petitioners. The Court should grant certiorari in order to resolve the conflict between the Fourth Circuit's interpretation of § 641 and prior court decisions.

B. Protection of Commercial Speech Rights Requires That § 641 Be Found Inapplicable to the Facts of This Case

A common denominator of virtually every prior decision upholding a § 641 prosecution for receipt/disclosure of government information is the negligible value to society of such receipt/disclosure. *Lambert/Girard* involved an agent and a former agent of the Drug Enforcement Administration who conspired to sell the names of DEA informants to marijuana smugglers, to assist them in their smuggling activities. *Girard*, 601 F.2d at 70. *Jeter* involved a man who sold secret grand jury transcripts to the grand jury's targets, to assist the targets in defending prosecutions for drug dealing. The Fourth Court's decision in *United States v. Truong Dinh Hung*, 629 F.2d 908 (4th Cir. 1980), *cert. denied*, 454 U.S. 1144 (1982), involved a man who obtained classified U.S. government documents dealing with U.S. Southeast Asia policy and passed them on to representatives of the communist Vietnamese government during the course of the 1977 Paris negotiations between Vietnam and the U.S. As the Sixth Circuit noted in *Jeter*, receipt/disclosure of government information in such circumstances -- involving conduct traditionally understood to be criminal -- has rarely been deemed worthy of First Amendment protection. *Jeter*, 775 F.2d at 678 (the defendant's "conduct would seem to constitute merely another type of ordinary criminal communication in a conspiracy that has been traditionally found undeserving of any First Amendment protection").

In marked contrast to those earlier § 641 prosecutions, this case involves the prosecution of two individuals who were seeking information in pursuit of a laudable commercial goal. Our nation's free-enterprise system owes its success to individuals such as Thomas McAusland and Christopher Pafort who have worked diligently to obtain the information necessary to permit their commercial enterprises to compete efficiently in a free market. There simply is no basis for equating Petitioners' conduct with

the conduct of marijuana smugglers, drug dealers who are grand jury targets, or spies for communist governments.

The federal government is within its rights in declaring explicitly -- as it did in adopting the Procurement Integrity Act -- that certain unclassified information relating to government procurements should never be released to procurement bidders. But we should not lightly assume that Congress would criminalize the receipt of such information *sub silentio* as part of a law directed against the theft of government property, particularly in view of the substantial First Amendment protection traditionally afforded to such commercial speech activity.

While the Court has held that commercial speech activity of the type engaged in by Petitioners is entitled to a somewhat lesser degree of protection than is political speech, the Court nonetheless has been vigilant in protecting commercial speech from unwarranted abridgment. As the Court said in upholding the right of consumers to receive commercial messages regarding pharmaceutical pricing:

> So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, *the free flow of commercial information is indispensable*.

Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 765 (1976) (emphasis added).[5]

---

[5] *Virginia State Board of Pharmacy* makes clear that it is irrelevant for purposes of First Amendment analysis whether Petitioners were the purveyors or recipients of information. *Id.* at 756 ("where a speaker exists, as is the case here, the protection afforded is to the communication, to its source and to its recipients both").

Throughout this case, the government has implied that Petitioners' behavior was base and somewhat sinister because they were seeking information for the sole purpose of maximizing the profits of their employer. To the contrary, in seeking to obtain information needed to permit their employers to maximize profits, Petitioners were acting in the best traditions of the American free-enterprise system. Indeed, the Court recently rejected the notion that a profit motive lessens the constitutional protection otherwise afforded to speech, stating, "Some of our most valued forms of fully protected speech are uttered for a profit." *Board of Trustees of the State University of New York v. Fox,* 109 S. Ct. 3028, 3036 (1989). The Court has, for example, afforded full First Amendment protection to the contents of a paid advertisement soliciting money. *New York Times Co. v. Sullivan,* 376 U.S. 254 (1964).

In light of the substantial First Amendment rights at issue in this case, the Court should grant certiorari in order to prevent § 641's expansion to reach conduct that has never before been the subject of a criminal prosecution. WLF respectfully suggests that the Court not impute to Congress an intent to reverse the normal presumption favoring the free flow of commercial information, absent a clear statement from Congress to that effect. Congress provided the necessary clear statement in adopting the Procurement Integrity Act, but nothing in the language or history of § 641 clearly indicates that Congress intended to criminalize the receipt of unclassified information whose dissemination is not otherwise prohibited by some other federal law or regulation.

II. THE APPLICATION OF § 641 (AS CONSTRUED BY THE FOURTH CIRCUIT) TO PETITIONERS VIOLATES THEIR DUE PROCESS RIGHTS

Lambert/Girard arrived at their limiting construction of § 641 in large measure in order to avoid the

constitutional vagueness problems that would have arisen had the statute been given a broader reading. *Lambert*, 446 F. Supp. at 899. That mode of statutory construction is entirely proper; it is a cardinal rule of statutory construction that where, as here, an otherwise acceptable construction of a statute would raise serious constitutional problems, a court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress. *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building and Construction Trades Council*, 108 S. Ct. 1392, 1397 (1988).

By declining in this case to employ the limiting construction of § 641 adopted in *Lambert/Girard,* the Fourth Circuit has rendered § 641 unconstitutionally vague as applied to Petitioners. Accordingly, the Court should grant certiorari and reverse Petitioners' convictions under either interpretation of § 641. A brief discussion of the void-for-vagueness doctrine should suffice to make clear why § 641 may not constitutionally be applied to Petitioners' conduct.

Chief among the protections afforded by the Due Process Clauses of the Fifth and Fourteenth Amendments is the right not to be deprived of life, liberty, or property on the basis of an overly vague law. *Grayned v. City of Rockford,* 408 U.S. 104, 108 (1972). As the Court explained in *Grayned*:

> Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and

> juries on an *ad hoc* basis, with the attendant dangers of arbitrary and discriminatory application.

Id. at 108-09. The prosecution of Petitioners under § 641 violates both of the important values cited by *Grayned* as underlying the void-for-vagueness doctrine.

First, § 641 cannot be said to have given Petitioners fair notice of what conduct is prohibited. The statute merely states that it is a crime to convert government property "without authority," but provides no definition of that term. As noted above, the First Amendment precludes construing the statute as prohibiting all conveyance and receipt of government information in the absence of express authorization to do so, but no other construction is readily suggested by the wording of § 641. At the very least, it was reasonable for Petitioners to have concluded that they were free under § 641 to obtain the procurement information at issue in this case, in light of the absence of formal regulations and/or other federal law prohibiting them from doing so and in light of the FARs' grant to contracting officers of discretion to release the information, regardless whether internal, nonpublic government rules were to the contrary.[6] Accordingly, prosecuting Petitioners under a statute that could reasonably be interpreted as permitting the conduct they engaged in violates their due process rights by failing to warn them adequately regarding the consequences of their conduct.

Second, permitting prosecutions under § 641 under these circumstances creates a grave danger of arbitrary and

---

[6] That conclusion was particularly reasonable in light of the existence of the *Lambert* decision in 1987-88, the years at issue in this prosecution.

discriminatory law enforcement.[7] If, as the government suggests in this case, informal government rules against disclosure are sufficient to criminalize release of government information, then any government supervisor who tells his subordinates not to disclose unclassified but embarrassing information could initiate criminal proceedings against a subordinate who goes ahead with disclosure. *Lambert*'s limiting construction of § 641 was based in part on the court's expressed desire to avoid the discriminatory enforcement dangers inherent in delegating to government supervisors the authority to determine on their own when dissemination of information is "without authority" and thus criminal. *Lambert,* 446 F. Supp. at 899.

Indeed, the prosecution of McAusland and Pafort has all the earmarks of arbitrary law enforcement that the void-for-vagueness doctrine was intended to prevent. Their prosecution coincides with the loud public outcry against procurement abuses that arose in connection with announcement of the Ill Wind investigation. That no one has ever previously been convicted under § 641 for receipt of information whose dissemination was not prohibited under any regulation or other federal law strongly suggests that the decision to prosecute was based on arbitrary political considerations rather than on the merits of their case. The temptation for prosecutors to construe § 641 for the first time as covering the release of documents whose release had just been criminalized under the Procurement Integrity Act was, no doubt, extremely strong. The void-for-vagueness doctrine is intended to prevent arbitrary criminal prosecutions of this sort.

That the conduct at issue in this case consisted of commercial activity in no way lessens Petitioners' right to

---

[7] The Supreme Court has recognized that the danger of such arbitrary and discriminatory enforcement is the more important of the two aspects of the void-for-vagueness doctrine. *Kolender v. Lawson,* 461 U.S. 352, 357-58 (1983); *Smith v. Goguen,* 415 U.S. 566, 575 (1974).

protection under the void-for-vagueness doctrine. While the Supreme Court has recognized that economic regulation is subject to a less strict vagueness test, that relaxation of the vagueness test does not apply when the government is attempting to impose criminal penalties on alleged violators of the economic regulation in question. *Kolender*, 461 U.S. at 358 n.8.

In sum, the void-for-vagueness doctrine dictates that if § 641 is properly construed as prohibiting Petitioners' conduct, then it is unconstitutionally vague as applied to them. The Court should grant certiorari in order to prevent Petitioners' conviction under an unconstitutionally vague law. That vagueness problem can be avoided only by construing § 641 (as was done in *Lambert*) as not applying to the receipt of unclassified government information whose release is not explicitly prohibited by a formal regulation or by some other federal law.

CONCLUSION

For all the foregoing reasons, *amicus curiae* Washington Legal Foundation respectfully submits that the petition should be granted.

Respectfully submitted,

DANIEL J. POPEO
RICHARD A. SAMP
(Counsel of Record)
WASHINGTON LEGAL
FOUNDATION
1705 N Street, NW
Washington, DC 20036
(202) 857-0240

January 6, 1993

Supreme Court, U.S.
FILED
FEB 5 1993
OFFICE OF THE CLERK

No. 92-960

IN THE

Supreme Court of the United States

October Term, 1992

THOMAS D. McAUSLAND and
CHRISTOPHER PAFORT,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To
The United States Court Of Appeals
For The Fourth Circuit

BRIEF OF ELECTRONIC INDUSTRIES ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

PETER F. McCLOSKEY
(Counsel of Record)
JOHN J. KELLY
ELECTRONIC INDUSTRIES ASSOCIATION
2001 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 457-4917

Date: February 5, 1993

Balmar Legal Publishing Services, Washington, D.C., (202) 682-9800

QUESTION PRESENTED

Whether a private citizen who obtains unclassified government information may be convicted of theft of government property (18 U.S.C. §641) or wire fraud (18 U.S.C. §1343) where disclosure of the information, although not prohibited by statute or published regulation, violates internal government rules, custom, or practice.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF THE AMICUS CURIAE	1
REASONS FOR GRANTING THE PETITION . . .	2
ARGUMENT	4
I. In The Absence Of Statute Or Published Regulation Prohibiting Disclosure, There Can Be No Criminal Violation For Obtaining Government Information	4
1. Government Information Is Presumptively Available to the Public	5
2. Criminal Liability Can Be Based On Obtaining Government Information Only Where Disclosure Of The Information Is Specifically Prohibited By Another Statute or Published Regulation	8
CONCLUSION	14

TABLE OF AUTHORITIES

Cases	Page(s)
Balthazar v. Superior Court, 573 F.2d 698 (1st Cir. 1978)	12
Bunge Corp. v. United States, 5 Cl. Ct. 511 (1984), *aff'd without op.*, 765 F.2d 162 (Fed. Cir. 1985)	12
Connally v. General Construction Co., 269 U.S. 385 (1926)	12
Department of the Air Force v. Rose, 425 U.S. 352 (1976)	5
D.W. Food Centers, Inc. v. Block, 786 F.2d 751 (6th Cir. 1986)	12
Grayned v. City of Rockford, 408 U.S. 104 (1972)	12
In re Pacific Far East Line, Inc., 314 F. Supp. 1339 (N.D. Cal. 1970), *aff'd*, 472 F.2d 1382 (9th Cir. 1973)	12
Kolender v. Lawson, 461 U.S. 352 (1983)	12
Morton v. Ruiz, 415 U.S. 199 (1974)	13
NI Ind.. Inc. v. United States, 841 F.2d 1104 (Fed. Cir. 1988)	12
NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214 (1978)	5
Robert v. United States Jaycees, 468 U.S. 609 (1984)	12
United States v. Fowler, 932 F.2d 306 (4th Cir. 1991)	3,9
United States v. Girard, 601 F.2d 69 (2d Cir.), *cert. denied*, 444 U.S. 871 (1979)	10,11

United States v. Hartec Enterprises,
967 F.2d 130 (5th Cir. 1992) 11

United States v. Jeter,
775 F.2d 670 (6th Cir. 1985),
cert. denied, 475 U.S. 1142 (1986) 11

United States v. Lambert,
446 F. Supp. 980 (D. Conn. 1978),
aff'd sub nom, 601 F.2d 69 (2d Cir),
cert. denied, 444 U.S. 871 (1979) 10,11

United States v. Morison,
844 F.2d 1057 (4th Cir.),
cert. denied, 488 U.S. 908 (1988) 9,11

United States v. Tobias,
836 F.2d 449 (9th Cir.)
cert. denied, 485 U.S. 991 (1988) 3

United States v. Truong Vinh Hung,
629 F.2d 908 (4th Cir. 1980),
cert. denied, 454 U.S. 1144 (1982) 9

STATUTES AND REGULATIONS

5 U.S.C. §552 5

18 U.S.C. §641 . . . . . *passim*

18 U.S.C. §1343 i

18 U.S.C. §1902 9

18 U.S.C. §1906-1908 9

18 U.S.C. §2511(a)(c) 9

26 U.S.C. §7213 9

41 U.S.C. §423(a) 9

DOD Reg. 5400.7-R, §§4-100, 4-300(a),
reprinted in 48 C.F.R. ch. 2, app. L (1987) . . 7

Exec. Order 12,356, 3 C.F.R. 166 (1982), reprinted 50 U.S.C. §401 note (1982) 8

Intelligence Identities Protection Act of 1982, 50 U.S.C. §421 9

Pub. L. No. 101-189, §822, 103 Stat. 1503 8

OTHER AUTHORITIES

Department of Defense, *Selling to the Military* 1 (Government Printing Office 1979) 6, 7

Hearings of Senate Subcommittee On Oversight of Government Management of Governmental Affairs, 101st Cong., 1st Sess. 120 (Feb. 24, 1989) 6,7

White Paper on DOD Acquisition Improvement, ch. 4, *reprinted in* 44 Fed. Cont. Rep. 1067 (BNA) (1985) 6

No. 92-960

IN THE

Supreme Court of the United States

October Term, 1992

THOMAS D. McAUSLAND and
CHRISTOPHER PAFORT,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To
The United States Court Of Appeals
For The Fourth Circuit

BRIEF OF ELECTRONIC INDUSTRIES ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

This brief amicus curiae of the Electronic Industries Association is filed with the consent of the parties and in support of petitioners, as provided for in the Rules of this Court.

INTEREST OF THE AMICUS CURIAE

The Electronic Industries Association (EIA) is a trade association comprised of companies involved in the design, manufacture, distribution and sale of electronics parts, components, equipment and systems. Many of these member companies are contractors to the federal government. Consequently, EIA is active in legal matters which impact on the government procurement process.

Amicus EIA is concerned that the prosecution's theory in this case will chill the exchange of information that is a natural and important part of contracting with the federal government. Free and constant communication between contractors and their government customers is essential to the government's procurement of goods and services. This case involves the prosecution of a private citizen for obtaining unclassified information about a procurement. The prosecution's theory imposes criminal sanctions on any individual who fails to successfully navigate the welter of unpublished internal government rules, customs, and practices regarding the disclosure of information. As such, this case threatens the free flow of information that lies at the heart of the government procurement process.

For this reason, amicus EIA believes that this case is of exceptional importance. Amicus has followed this case closely and filed briefs before the United States Court of Appeals for the Fourth Circuit. EIA believes that as the representative for numerous private contractors, it brings a unique perspective to this case. As a participant in government contracting, amicus EIA can show how this prosecution will gravely harm the effective workings of the government procurement process and runs counter to well established law.

REASONS FOR GRANTING THE PETITION

In this case, petitioners Thomas D. McAusland and Christopher M. Pafort challenge their conviction for theft of government property under 18 U.S.C. §641 (and related wire fraud and conspiracy counts) for obtaining unclassified government information in connection with certain government procurements. McAusland and Pafort were marketing executives at Litton Data Systems. The two Litton marketing executives were *not* charged with using unlawful means to obtain this information from government officials. There was no allegation that appellants bribed or blackmailed any official or stole any document in connection with obtaining this information. Nor was there any

allegation that the disclosure of this government information violated any published rule, regulation or statute. Rather, the defendants were convicted solely because unpublished, internal government policies and practices prohibited the disclosure of this information.

This prosecution presents a novel theory of criminal liability. The courts of appeals are split as to whether an information can be considered a "thing of value" within the reach of section 641. *Compare, e.g., United States v. Tobias*, 836 F.2d 449, 451, (9th Cir.), *cert. denied*, 485 U.S. 991 (1988) ("section 641 should not be read to apply to intangible goods") *with United States v. Fowler*, 932 F.2d 306, 309-10 (4th Cir. 1991) (rejecting Ninth Circuit's interpretation). Moreover, no court prior to this case had extended criminal liability to cover the receipt of information in the absence of a statute or regulation prohibiting dissemination of the information. As a result, the ruling below expands the criminal law into new areas, with potentially far-reaching and dangerous ramifications.

Section 641 prohibits the conversion, conveyance or disposal of government property "without authority." The phrase "without authority" is easily understood when applied to the conversion of tangible property, such as a post office truck or office supplies. This phrase, however, defies clear, consistent and ascertainable meaning when applied to government information. Government information is presumed to be available to the public. Government contractors expect to exchange information with their government customer. In the face of the expectation and presumption of public availablity of government information, criminal liability must be grounded on more than unpublished internal government rules and customs. A fair reading of the statute and the dictates of due process demand that, in the context of government information, the phrase "without authority" requires that the private citizen obtain the

government information in violation of a statute or published regulation.

The exchange of information between contractors and the government is essential to the government's ability to acquire complex electronics in a timely and cost-effective manner. This continuous dialogue between the government customer and its private contractor suppliers is threatened, however, by the concept that private individuals can be held criminally liable for obtaining information whose disclosure violates an unpublished, internal government practice or policy. Amicus EIA recognizes that there exists certain information which for national security or other reasons should not be publically available; its member companies steadfastly adhere to all statutes or published regulations prohibiting the release of specific pieces of information. Nevertheless, to extend criminal liability under 18 U.S.C. §641 to encompass obtaining information whose disclosure is prohibited by internal government rules or customs is contrary to both well established law and sound public policy.

ARGUMENT

I. In The Absence Of Statute Or Published Regulation Prohibiting Disclosure, There Can Be No Criminal Violation For Obtaining Government Information.

When contractors exchange information with government employees, they do so with the understanding that the following syllogism governs their relationship: 1) government information is presumptively available to the public, 2) except where disclosure is specifically prohibited by published law or regulation; 3) therefore, in the absence of a published law or regulation, there can be no criminal violation for obtaining government information. The prosecution's theory here conflicts with this syllogism. The prosecution in this case ignores the reality of the government-contractor relationship and expands criminal

liability for obtaining government information beyond the bounds permitted by statute or the United States Constitution.

1. Government Information Is Presumptively Available to the Public

The presumption throughout American history has been that information possessed by the government is freely available to the citizenry. Except for a few specifically designated areas such as national security affairs, the conveyance of government information is not subject to restriction. In recent years, this principle has been codified in the Freedom of Information Act, 5 U.S.C. §552 (1988), as amended (the "FOIA"), which makes clear that government records and information will generally be made available to the public. The FOIA requires public disclosure of all government records, subject to nine specific exemptions. *See Department of the Air Force v. Rose*, 425 U.S. 352 (1976). "The basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). "[D]isclosure, not secrecy, is the dominant objective of the [FOIA] Act." *Dept. of the Air Force v. Rose*, 425 U.S. at 460-61.

This general principle extends to government procurements. Industry must work closely with the government to meet the complex procurement demands of the government, and, as a result, government employees constantly provide information to contractors about the government's procurement requirements. The need for exchanges of information in the government procurement process has been acknowledged by Department of Defense officials:

> Because of the nature of the Defense marketplace, with its enormous resource investments, extended research and development efforts and lengthy periods required to get complex weapons systems into

> production, Government and industry share an interest in the affirmative provision of sufficient relevant information regarding the Government's future needs to enable industry reasonably to plan to meet them.

Hearings of Senate Subcommittee On Oversight of Government Management of Governmental Affairs, 101st Cong., 1st Sess. 120 (Feb. 24, 1989) ("Oversight Hearings"), at 73 (testimony of Undersecretary of the Navy H. Lawrence Garrett, III). Assistant Secretary of Defense Wade has voiced similar sentiments, explaining that the Government's goal was not a distant, arm's-length regulatory relationship with contractors, but rather a "close, continuous association of [government] users, developers, the R&D community, and manufacturers." *See* White Paper on DOD Acquisition Improvement, ch. 4, *reprinted in* 44 Fed. Cont. Rep. 1067 (BNA) (1985).

In addition, the government's own written advice to contractors encourages them to obtain information from the "government customer." The Department of Defense in its pamphlet, *Selling to the Military*, advises prospective contractors:

> Interested business firms must help themselves by learning how the Department of Defense conducts its business, and by seeking out those military purchasing offices which buy supplies and services they can supply.
>
> Actually, there is nothing particularly new or different in selling your products or services to the various defense organizations. Basic principles followed in selling within the private sector apply in dealing with the Department of Defense. Two of these principles that are especially appropriate in establishing and keeping a working relationship with military procurement activities are:

> Learn your customer's needs as well as his buying policies and practices.
>
> Follow leads on where buying is done, and search out selling opportunities in all segments of the defense organization.

Department of Defense, *Selling to the Military* 1 (Government Printing Office 1979).

In fact, the need for government contractors to have especially wide access to government information was recognized in the development of the "For Official Use Only" ("FOUO") stamp. Pursuant to published DOD regulations, designating a document as FOUO indicated that a document could "be withheld from the public for one or more of the reasons cited in" the exemptions to FOIA. The published DOD regulations expressly did not prevent exchanges of FOUO-marked information "between DOD components and DOD *contractors*, consultants and grantees." DOD Reg. 5400.7-R, §§4-100, 4-300(a), reprinted in 48 C.F.R. ch. 2, app. L (1987) (emphasis added).

The FOUO legend also is a perfect example of the problems inherent in relying on internal government practices. The rule advocated by the prosecution here opens the way for a confusing maze of conflicting departmental policies and customs. At oversight hearings held by the Senate in 1989, Army and Air Force representatives stated that they relied on the FOUO legend to indicate that a document should not be released to contractors. Navy representatives indicated that their command adopted a different rule allowing disclosure of FOUO documents to contractors. Senate Subcommittee Chairman Levin pointedly noted that DOD's own rules permitted documents marked FOUO to be available to contractors. *See* Oversight Hearing, at 34-37, 59-62. As Senator Levin noted, the marking of documents FOUO left a "big gray area out there [containing] a lot of documents." Id. at 60.

The "big gray area" surrounding FOUO documents is typical of the conflicting rules and practices regarding disclosure of information. Only with promulgation of the regulations implementing the Federal Procurement Policy Act Amendments of 1988 ("Procurement Integrity Act") did there emerge "a single uniform regulation for the Department of Defense regarding dissemination of, and access to, acquisition information." Pub. L. No. 101-189, §822, 103 Stat. 1503. Yet, the Procurement Integrity Act is neither all encompassing, nor necessarily the final word on the disclosure of procurement information. Different agencies and departments may develop their own unpublished internal rules. The inconsistencies and contradictions regarding FOUO documents and the pre-Procurement Integrity Act scheme in general, is symptomatic of the problems inherent in relying on unpublished internal government policies and customs.

2. Criminal Liability Can Be Based On Obtaining Government Information Only Where Disclosure Of The Information Is Specifically Prohibited By Another Statute or Published Regulation

In light of the longstanding policy favoring public access to government information and the close customer-supplier relationship that the government fosters, contractors assume that it is permissible for them to obtain the information provided by government personnel. It is understood that Congress and the executive may carve out exceptions to this general presumption of public access if they so choose. Congress and the executive have plainly shown their ability to prohibit the release of certain specific types of information, for example, passing laws and promulgating regulations prohibiting the disclosure of classified national security information, *see* Exec. Order 12,356, 3 C.F.R. 166 (1982), *reprinted* 50 U.S.C. §401 note (1982),[1] grand jury materials, *see* Fed. R. Crim. P. 6(e), and the names of secret

[1] It should be noted that the decisions in this Circuit upholding §641 convictions based on government information have all arisen in the context

government agents, *see* Intelligence Identities Protection Act of 1982, 50 U.S.C. §421.[2] Absent such a clear public pronouncement that the information in question is not to be disclosed, one should be permitted to assume that government information is properly available to the general public.[3]

Unpublished, internal government rules or practices prohibiting disclosure are too slender a reed to sustain criminal liability for obtaining government information. Section 641 prohibits the conveyance of government property "without authority".[4] When applied to government information, this statute, standing alone, is too vague to survive close scrutiny. In the context of tangible property, the statute's meaning is straightforward. Tangible government property, such as a government vehicle or computer, does not have an underlying presumption of public availability and use. In regard to the intangible of government information, however, the "without authority" language is "virtually devoid of meaning."

---

of classified national security information. *See United States v. Morison*, 844 F.2d 1057 (4th Cir.), *cert. denied*, 488 U.S. 908 (1988); *United States v. Fowler*, 932 F.2d 306 (4th Cir. 1991); *United States v. Truong Vinh Hung*, 629 F.2d 908 (4th Cir. 1980), *cert. denied*, 454 U.S. 1144 (1982).

[2] *See also* 18 U.S.C. §1902 (crop reports); 18 U.S.C. §1906-1908 (bank examination information); 18 U.S.C. §2511(a)(C) (information obtained through electronic surveillance); 26 U.S.C. §7213 (tax returns). It is also significant to note that Congress has now enacted a statute specifically criminalizing the use of specific types of government procurement information. *See* 41 U.S.C. §423(a) (1991).

[3] One also should be permitted to assume that government personnel are performing their job properly, that is, releasing data which is within their authority to release.

[4] Section 641, in pertinent part, imposes criminal penalties on any person who "knowingly converts . . . or without authority, sells, conveys or disposes of any . . . thing of value of the United States." 18 U.S.C. §641.

> [B]ecause property rights in tangible items are easily discerned, there is little confusion about when a transfer or possession is 'without authority'. In the realm of government records and information, however, there is no established common law of exclusive possession. In addition, the government's interest in secrecy must in every case be carefully balanced against the First Amendment interest in disclosure . . . . *By regulating the disclosure of government information, §641 clearly touches a sensitive constitutional area.* Therefore the need for definiteness is acute. Yet §641 provides no greater guidance as to when disclosure is prohibited than it does in regard to traditionally recognizable possessory interests. *Indeed, the statutory phrase 'without authority' is virtually devoid of meaning when applied to the transfer of information.*

United States v. Lambert, 446 F. Supp. 890, 898 (D. Conn. 1978), *aff'd sub nom. United States v. Girard*, 601 F.2d 69 (2d Cir.), *cert. denied*, 444 U.S. 871 (1979).

The case law governing §641 has recognized the problematic nature of the "without authority" language. Consequently, courts have mandated that, in regard to government information, section 641 can only serve as the grounds for a criminal prosecution where the disclosure of the information in question was clearly and expressly prohibited by another statute or published regulation.

> The section must be read as merely establishing a penalty for the violation of other, more particular, prohibitions against disclosure. Thus, the jury may consider only transfers of information affirmatively prohibited by other federal statutes, administrative rules and regulations . . .

Id.[5] *See also United States v. Morison*, 894 F.2d at 1074 (statute is "clarified by government's classification system for national security documents"); *United States v. Jeter*, 775 F.2d 670, 681-82 (6th Cir. 1985) (upholding §641 convictions where appellants violated Fed. R. Crim. P. 6(e) by obtaining secret grand jury information), *cert. denied*, 475 U.S. 1142 (1986).[6]

Employees of government contractors working closely on a daily basis with government employees are entitled to fair warning of their possible criminal exposure when receiving information from government officials. The "without authority" language of §641, by itself, offers no guidance as to what conduct is to be punished in regard to government information. Moreover, with the large number of unpublished internal government rules and practices regarding information dissemination, the potential for selective enforcement is great. In light of the stakes involved — deprivation of one's liberty and curtailment of the exchange of government information — the need for a bright line rule is critical. The only acceptable bright line rule mandates that §641 be applied only where there exists another statute or published regulation prohibiting disclosure of the government information. Anything less than a bright line rule based on the existence of another statute or published

---

[5] The *Lambert* court also speculated that "perhaps" longstanding government practices alone could be used to give content to Section 641. We have found no cases, however, where courts have ruled that government practices or customs can serve as the basis for a Section 641 conviction. Moreover, the Second Circuit in affirming *Lambert* specifically referred only to "rules and regulations," which it considered "both a delimitation and clarification of the conduct proscribed by [§641]." *Girard*, 601 F.2d at 71.

[6] This is a paradigmatic case for application of the rule of lenity. "The rule of lenity compels us to construe ambiguous criminal statutes in favor of lenity. The rule promotes fair notice of prohibited conduct and reduces the likelihood that unintentionally criminal conduct will be penalized." *United States v. Hartec Enterprises*, 967 F.2d 130, 133 (5th Cir. 1992) (citations ommitted) (applying rule of lenity to Section 641 and reversing convictions).

regulation prohibiting disclosure would run afoul of the due process clause.

Under the due process clause, a law "must give the person of ordinary intelligence a reasonable opportunity to know what is prohibited so that he may act accordingly." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).[7] Criminal penalties cannot be imposed where the statute "forbids . . . the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." *Robert v. United States Jaycees*, 468 U.S. 609, 629 (1984)(quoting *Connally v. General Construction Co.* 269 U.S. 385, 391 (1926)); *see also Balthazar v. Superior Court*, 573 F.2d 698, 699-700 (1st Cir. 1978). Because the general presumption holds that government information is publicly available, fair warning under the due process clause requires that the prohibition against disclosure take the form of a statute or published regulation.

To permit government contractors to be held criminally liable based on internal departmental rules or practices also would be inconsistent with the long line of cases holding that a person cannot be held responsible for rules or regulations which are not published in the Federal Register. *See, e.g., Bunge Corp. v. United States*, 5 Cl. Ct. 511, 523 (1984), *aff'd without op.*, 765 F.2d 162 (Fed. Cir. 1985); *D.W. Food Centers, Inc. v. Block*, 786 F.2d 751, 757 (6th Cir. 1986); *In re Pacific Far East Line, Inc.*, 314 F. Supp. 1339 (N.D. Cal. 1970), *aff'd*, 472 F.2d 1382 (9th Cir. 1973).[8] Publication in the Federal Register has been deemed necessary "to avoid the inherently arbitrary nature of

---

[7] "[A] penal statute [must] define the criminal offense with sufficient definitions that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983).

[8] "[S]tatutes and case law make clear the requirement that regulations that affect a person's substantive rights [must] be published in the Federal Register." *NI Ind., Inc. v. United States*, 841 F.2d 1104, 1107 (Fed. Cir. 1988).

unpublished *ad hoc* determinations." *Morton v. Ruiz*, 415 U.S. 199, 232 (1974). Similarly, under §641, the statute or published regulation is necessary to avoid the prospect of criminal liability being premised on an individual's subjective knowledge or, even more dubiously, conscious avoidance of knowledge of some internal departmental policy or practice governing release of certain information.

CONCLUSION

For the reasons set forth above, amicus curiae Electronic Industries Association respectfully submits that the petition should be granted.

Respectfully submitted,

PETER F. McCLOSKEY
(Counsel of Record)
JOHN J. KELLY
ELECTRONIC INDUSTRIES ASSOCIATION
2001 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 457-4917

Date: February 5, 1993

Supreme Court, U.S.
FILED
MAR 4 1993
OFFICE OF THE CLERK

No. 92-960

In the Supreme Court of the United States

OCTOBER TERM, 1992

THOMAS D. MCAUSLAND AND CHRISTOPHER M. PAFORT, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

LIBRARY
SUPREME COURT, U.S.
WASHINGTON, D.C. 20543

BRIEF FOR THE UNITED STATES IN OPPOSITION

WILLIAM C. BRYSON
Acting Solicitor General

JOHN C. KEENEY
Acting Assistant Attorney General

LOUIS M. FISCHER
Attorney

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether petitioners' acquisition of confidential government information generated in connection with competitively bid defense procurements constituted theft of government property, in violation of 18 U.S.C. 641, and the fraudulent obtaining of government property by the use of interstate wire communications, in violation of 18 U.S.C. 1343.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	2
Argument	11
Conclusion	24

TABLE OF AUTHORITIES

Cases:

Bell v. *United States*, 462 U.S. 356 (1983)	13
Board of Trade v. *Christie Grain & Stock Co.*, 198 U.S. 236 (1905)	11
Boyce Motor Lines, Inc. v. *United States*, 342 U.S. 337 (1952)	20
Carpenter v. *United States*, 484 U.S. 19 (1987)	11, 20
Chappell v. *United States*, 270 F.2d 274 (9th Cir. 1959)	15
Dowling v. *United States*, 473 U.S. 207 (1985)	13
Fort Stewart Schools v. *FLRA*, 495 U.S. 641 (1990)	23
Gorin v. *United States*, 312 U.S. 19 (1941)	20
John Doe Agency v. *John Doe Corp.*, 493 U.S. 146 (1989)	12
McNally v. *United States*, 483 U.S. 350 (1987)	16
Morissette v. *United States*, 342 U.S. 246 (1952)	13
Moskal v. *United States*, 111 S. Ct. 461 (1990)	13
Screws v. *United States*, 352 U.S. 91 (1945)	20
United States v. *Barger*, 931 F.2d 359 (6th Cir. 1991)	14, 22
United States v. *Conover*, 845 F.2d 266 (11th Cir. 1988)	17
United States v. *DiGilio*, 538 F.2d 972 (3d Cir. 1976), cert. denied, 429 U.S. 1038 (1977)	15
United States v. *Fowler*, 932 F.2d 306 (4th Cir. 1991)	9, 14
United States v. *Friedman*, 445 F.2d 1076 (9th Cir.), cert. denied, 404 U.S. 958 (1971)	16
United States v. *Girard*, 601 F.2d 69 (2d Cir.), cert. denied, 444 U.S. 871 (1979)	8, 14-15, 20, 21

Cases—Continued: Page

United States v. *Jeter*, 775 F.2d 670 (6th Cir. 1985), cert. denied, 475 U.S. 1142 (1986) 14, 22, 24
United States v. *Jones*, 677 F. Supp. 238 (S.D.N.Y. 1988) 21
United States v. *Kato*, 878 F.2d 267 (9th Cir. 1989) 16-17
United States v. *Lambert*, 446 F. Supp. 890 (D. Conn. 1978) 21
United States v. *May*, 625 F.2d 186 (8th Cir. 1980) 15
United States v. *Mazurie*, 419 U.S. 544 (1975) 10
United States v. *Morison*, 844 F.2d 1057 (4th Cir.), cert. denied, 488 U.S. 908 (1988) 8-9
United States v. *Perholtz*, 842 F.2d 343 (D.C. Cir.), cert. denied, 488 U.S. 821 (1988) 12, 16
United States v. *Ragen*, 314 U.S. 513 (1942) 20
United States v. *Reynolds*, 345 U.S. 1 (1953) 12
United States v. *Schwartz*, 785 F.2d 673 (9th Cir.), cert. denied, 479 U.S. 890 (1986) 16
United States v. *Slay*, 858 F.2d 1310 (8th Cir. 1988) 17
United States v. *Tobias*, 836 F.2d 449 (9th Cir.), cert. denied, 485 U.S. 991 (1988) 15, 16

Constitution, statutes and regulations:

U.S. Const.:
Amend. I 13, 14
Amend. V (Due Process Clause) 9-10
Office of Federal Procurement Policy Act Amendments of 1988 (Procurement Integrity Act), Pub. L. No. 100-679, § 6, 102 Stat. 4063 23
41 U.S.C. 423 (Supp. II 1990) 23
41 U.S.C. 423(j)(1) (Supp. II 1990) 23
41 U.S.C. 423(p)(6) (Supp. II 1990) 23
41 U.S.C. 423(p)(7) (Supp. II 1990) 23
18 U.S.C. 371 ..... 2, 9
18 U.S.C. 641 ..... *passim*
18 U.S.C. 1341 11
18 U.S.C. 1343 ..... 2, 7, 8, 9, 11, 12, 20

Statutes and regulations—Continued: Page

18 U.S.C. 2113(b) 13
18 U.S.C. 2314 13
48 C.F.R. (1987):
Section 15.413-1(a) 4
Section 15.609(a) 3
Section 15.610(d)(2) 5
Section 15.610(d)(3) 5
Section 15.612(c) 6
Section 15.612(d) 5
Section 15.612(e) 5, 6
Section 15.612(e)(1) 5

Miscellaneous:

DoD Directive 4105.62(E)(3)(c) (Sept. 9, 1985) 4
Department of the Navy, Naval Electronic Systems Command, NAVELEX INST. 4200.6D (Jan. 29, 1982) . 7
Department of the Navy, Naval Electronic Systems Command, NAVELEX INST. 4200.12C Change Transmittal No. 1 (Feb. 5, 1973) 4

In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-960

THOMAS D. MCAUSLAND AND CHRISTOPHER M. PAFORT, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 979 F.2d 970.

JURISDICTION

The judgment of the court of appeals was entered on August 14, 1992. A petition for rehearing was denied on October 1, 1992. Pet. App. 16a. The petition for a writ of certiorari was filed on December 4, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Virginia, petitioners were convicted on one count of conversion of government property, in violation of 18 U.S.C. 641; four counts of wire fraud, in violation of 18 U.S.C. 1343; and one count of conspiring to commit the above offenses and to defraud the United States, in violation of 18 U.S.C. 371. They were each sentenced to 12 months' imprisonment. The court of appeals affirmed. Pet. App. 1a-15a.

1. Between March 1987 and June 1988 petitioners conspired with Thomas Muldoon to obtain sensitive government procurement information from the Department of Defense concerning three contracts on which petitioners' employer, Litton Data Systems, had made or was considering making bids. Petitioner McAusland was vice-president of marketing or business development, and petitioner Pafort was a director of business development for Litton. Muldoon was an independent consultant hired by petitioners. Petitioners used Muldoon to obtain from Navy employees documents and information on Navy procurements that the employees were not authorized to disclose to petitioners or others outside the government. Pet. App. 3a-9a.

The procurement process takes place within the framework of the Federal Acquisition Regulations (FARs). A procurement begins when an agency formulates a program to meet national defense needs and then issues a request for proposals. After the proposals are submitted, the agency performs an initial evaluation, separately analyzing the cost and

technical components of the proposals. The contracting officer or advisory team then combines the two components and evaluates them to determine the "competitive range" for the procurement. The range consists of proposals that "have a reasonable chance of being selected for award." 48 C.F.R. 15.609(a) (1987). Proposals falling outside that range are not further considered. After the initial evaluation, the agency can enter into formal discussions with the remaining competitors and may invite the competitors to submit their "best and final offers" (BAFOs). The source selection authority then decides to whom to award the contract based on the recommendations of the contracting officer or advisory team. Pet. App. 3a-4a.

Muldoon provided petitioners with information on three procurements: (1) the Advanced Tactical Air Command Central (ATACC), a procurement for a radar command and control system by the Space and Naval Warfare Systems Command (SPAWAR); (2) UYQ-21, a procurement for a radar display system conducted by Naval Sea Systems Command (NAVSEA); and (3) Fiber Optics Cable System (FOCS), a procurement by SPAWAR for a Marine Corps fiber optic communications system. Pet. App. 4a.

a. *ATACC procurement.* In April 1987, SPAWAR issued a request for proposals (RFP) for the ATACC procurement. The RFP stated that proposals would be evaluated in four areas, but it did not give the

weights the government evaluators assigned to each area.[1] Pet. App. 5a.

Pafort asked Muldoon to obtain information about the ATACC procurement, and Muldoon eventually succeeded in obtaining the evaluation weights the government would use in assessing the bids. Muldoon paid another consultant, Mark Saunders, for that information; Saunders obtained the information from George Stone, the SPAWAR official responsible for conducting the ATACC procurement. Pet. App. 5a.

When Litton was ready to submit its ATACC bid, McAusland and Muldoon agreed that Muldoon should not attempt to get copies of their competitors' technical proposals because to do so would be "playing with fire."[2] Pet. App. 5a. On August 21, 1987, Pafort

---

[1] A Department of Defense regulation prohibits disclosure of the numerical weights for evaluation criteria. The regulation states that such weights "will not be disclosed either to offerors or to evaluators other than the [Source Selection Advisory Counsel], to preclude intentional or unintentional bias in proposals or evaluations." DoD Directive 4105.62(e)(3)(c) (Sept. 9, 1985), *reproduced at* C.A. App. 253 and *quoted at* Pet. App. 12a n.4. The relevant component of the Department of the Navy similarly had in place a directive prohibiting release of proposal evaluation weights. Department of the Navy, Naval Electronic Systems Command, NAVELEX INST. 4200.12C Change Transmittal No. 1 (Feb. 5, 1973), *reproduced at* C.A. App. 247.

[2] A FAR rule prohibited the disclosure of information in proposals outside the government: "After receipt of proposals, none of the information contained in them or concerning the number or identity of offerors shall be made available to the public or to anyone in the Government not having a legitimate interest." 48 C.F.R. 15.413-1(a) (1987). Another FAR rule prohibited "[t]echnical transfusion," *i.e.*, disclosure of "tech-

asked Muldoon when he would be able to obtain the "numbers" (competitors' bid figures). Wiretap Tr. No. 17. In late September 1987, Muldoon told Pafort he had asked his source to find out where Litton stood in comparison with the other bidders. Muldoon said that if he obtained that information, Pafort should come to Washington rather than discuss the information over the telephone. Pet. App. 6a. On September 29, Muldoon learned from Stone through Saunders the amount each competitor had bid, that Litton's bid was highest and that Litton's bid, most likely, would not be in the competitive range. Muldoon gave that information to McAusland, who agreed not to withdraw Litton's bid, because Litton was not supposed to know that it would be eliminated.[3] *Ibid.*

In February 1988, Pafort asked Muldoon for information on the ranking of the competitors. Muldoon had received that information from Saunders, who in

---

nical information" from one competitor to another. 48 C.F.R. 15.610(d)(2) (1987).

[3] A FAR rule, 48 C.F.R. 15.610(d)(3) (1987), prohibited government officials from engaging in "[a]uction techniques," including "[a]dvising an offeror of its price standing relative to another offeror." The FAR rule on source selection, which covered rankings, ratings, and evaluation comments prepared by evaluation and advisory groups, 48 C.F.R. 15.612(d) (1987), required that agencies "exercise particular care to protect source selection information on a strict need-to-know basis," and prevent release absent "approval by the source selection authority." 48 C.F.R. 15.612(e) and (e)(1) (1987). Source selection authorities, in accordance with standard practice in competitive procurements, did not release information regarding rankings, ratings, or evaluations to other competitors. C.A. App. 359, 396, 433, 436.

turn had obtained it from Stone. In March 1988, SPAWAR officials informed Litton that it was eliminated from the competition. Pet. App. 7a.

b. *UYQ-21 procurement.* In June 1987, Litton and two competitors submitted bids to NAVSEA on the UYQ-21 contract. Petitioners spoke to Muldoon about the procurement on several occasions. On July 29, Muldoon told McAusland that he had copies of the government's evaluation of the price proposals. Pet. App. 7a. Two days later, Muldoon left a document for McAusland at Litton's Virginia office that contained information corresponding to the government's source selection plan for the UYQ-21 procurement. Muldoon had obtained the information from a member of the government's cost review team that was reviewing the proposals.[4] *Id.* at 7a-8a.

In August, Muldoon told petitioners that the Navy would likely award the contract without requesting BAFOs. Based on information obtained from the government official who was on the UYQ-21 cost review team, Muldoon also advised petitioners that Litton was second behind Raytheon in the bidding. Pet. App. 8a. Also during July and August, Muldoon told McAusland that he knew a government official who could ensure a request for BAFOs if Litton provided some money. After Muldoon advised McAusland that he could not obtain the technical evaluations before Litton would have to submit its

---

[4] The confidentiality of the source selection plan was covered by 48 C.F.R. 15.612(c) and (e) (1987). See note 3, *supra*. Source selection plans were never to be released outside the government. C.A. App. 361, 430, 443.

BAFO, McAusland said he did not want to pursue that course of action. *Ibid.*

c. *FOCS procurement.* In December 1987, Muldoon provided a copy of the government's draft acquisition plan for the FOCS procurement to McAusland.[5] In early 1988, Pafort told Muldoon that Litton was interested in the program and asked Muldoon to check on a proposed date in the plan. Ultimately, Litton did not submit a bid. Pet. App. 9a.

2. The indictment charged petitioners with conspiring to defraud the United States by (1) depriving the Navy of the honest services of its employees and impairing and impeding government functions in competitive procurements, and (2) converting government property (procurement sensitive information) in violation of 18 U.S.C. 641 and engaging in wire fraud in violation of 18 U.S.C. 1343.[6] The

---

[5] A SPAWAR regulation specifically prohibited release of the plan: "Because of the planning nature of acquisition plans, those which do not contain classified information shall be marked 'FOR OFFICIAL USE ONLY' in accordance with the guidelines of SECNAVINST 5570.2B. The content of an Acquisition Plan is privileged information and shall be prepared internally. Neither information contained therein nor copies thereof shall be released to contractors." Department of the Navy, Naval Electronic Systems Command, NAVELEX INST. 4200.6D (Jan. 29, 1982), *reproduced at* C.A. App. 251.

[6] 18 U.S.C. 641 makes it a crime when a person "embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States or of any department or agency thereof."

18 U.S.C. 1343 makes it a crime when a person, "having devised or intending to devise any scheme or artifice to

indictment also charged petitioners with the substantive offenses of violating Section 641 by converting procurement sensitive information in connection with the ATACC procurement, and violating Section 1343 by scheming to deprive the government of its exclusive use of such information. C.A. App. 17-38.

Before trial, the district court rejected claims that information was not a "thing of value" under Section 641 and that the provision was unduly vague. Pet. App. 20a-22a. After the jury found petitioners guilty, the court rejected petitioners' post-verdict motion for a judgment of acquittal. The court found that the jury had sufficient evidence to find that petitioners "sought and received procurement sensitive information from Mr. Muldoon, and that procurement sensitive information was not authorized to be released." *Id.* at 24a. The court also found that "[t]here was also evidence from which the jury could find that [petitioners] knew it was not authorized to be released." *Ibid.*

3. The court of appeals affirmed. Pet. App. 1a-15a. Petitioners argued that 18 U.S.C. 641 does not bar the theft of government information unless published regulations clearly prohibit disclosure of the information. Relying on *United States* v. *Girard*, 601 F.2d 69 (2d Cir.), cert. denied, 444 U.S. 871 (1979), and *United States* v. *Morison*, 844 F.2d 1057 (4th Cir.),

---

defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits * * * by means of wire * * * communication in interstate * * * commerce, any * * * sounds for the purpose of executing such scheme or artifice."

cert. denied, 488 U.S. 908 (1988), petitioners claimed that Section 641 mandates resort to statutes or regulations in order to give meaning to the prohibition against conveyance of government information "without authority." Absent such external standards barring disclosure, petitioners argued that Section 641 is unconstitutionally vague. Petitioners made the same argument with respect to their convictions under 18 U.S.C. 371 and 1343.[7] Pet. App. 9a-10a.

The court of appeals rejected petitioners' claims. It found that neither *Girard* nor *Morison* held that there must be published regulations specifically prohibiting the disclosure of information to support a prosecution under Section 641. Rather, the court stated that, in those cases, vagueness concerns were eliminated through the existence of published regulations prohibiting disclosure. Such regulations, the court concluded, are not "the exclusive method of preventing vagueness," and the absence of FARs covering all of the information converted by petitioners therefore did not immunize petitioners from prosecution under Section 641. Pet. App. 11a.

The court of appeals also rejected petitioners' contention that applying Section 641 to their conduct violates vagueness principles under the Due Process

---

[7] Petitioners also argued that information should not be considered a "thing of value" under 18 U.S.C. 641. Pet. C.A. Br. 28 n.10. The court of appeals noted that it had previously held that information constitutes a "thing of value" under Section 641 in *United States* v. *Fowler*, 932 F.2d 306 (4th Cir. 1991). Pet. App. 9a n.2. Petitioners did not argue that information should not be considered "property" under 18 U.S.C. 371 or 1343. See Pet. C.A. Br. 30-32.

Clause. Pet. App. 12a. Examining the vagueness claim "in the light of the facts of the case at hand," *ibid.*, quoting *United States* v. *Mazurie*, 419 U.S. 544, 550 (1975), the court found that the evidence established that the "disclosure was without authority and that [petitioners] knew as much." Pet. App. 12a. The court referred to (1) the published FARs that prohibited disclosure; (2) other Department of Defense regulations that prohibited disclosure; and (3) legends on many of the documents obtained by petitioners specifically restricting disclosure of those documents. *Id.* at 12a-13a.

The court of appeals further noted that petitioners' conduct indicated their awareness that the "disclosure was without authority." Pet. App. 13a. The court observed that McAusland had agreed that he should not withdraw Litton's ATACC bid, because he was not supposed to know where Litton stood in the competition. McAusland had also agreed with Muldoon that having Muldoon obtain competitors' bids would be "playing with fire." Similarly, Pafort agreed to meet with Muldoon in person to avoid discussing information over the telephone. And at trial Pafort conceded that it "was not the correct thing to do" to ask for the rankings and technical evaluations of competitors. *Ibid.* Finally, the court of appeals noted that the two government employees who had furnished the information testified that they were not authorized to make the disclosures, and other procurement officials testified that petitioners, given their experience and positions, would have known that the information was not subject to disclosure. *Ibid.* In view of those factors, the court concluded that the

statute was not vague as applied to petitioners' conduct. *Id.* at 13a-14a.[8]

ARGUMENT

1. Petitioners contend (Pet. 12-17) that government information is not a "thing of value" that can be converted under 18 U.S.C. 641 or "property" that can be obtained by fraud under 18 U.S.C. 1343. They further argue that the courts of appeals are divided on those issues. Petitioners' claims are incorrect and do not warrant this Court's review.

a. Section 641 punishes the knowing conversion of any "thing of value" of the United States. 18 U.S.C. 641. Section 1343 punishes any "scheme or artifice to defraud" executed through wire communications. 18 U.S.C. 1343. Improperly obtaining government information with respect to internal methods, deliberations, and determinations in a competitive procurement falls within the scope of those prohibitions.

In *Carpenter* v. *United States*, 484 U.S. 19, 25 (1987), this Court held that the misappropriation of confidential business information violates "property" rights protected by the mail and wire fraud statutes, 18 U.S.C. 1341 and 1343. The Court observed that "[c]onfidential business information has long been recognized as property." 484 U.S. at 26, citing, *inter alia*, *Board of Trade* v. *Christie Grain & Stock Co.*, 198 U.S. 236, 250-251 (1905). Under *Carpenter*, a

---

[8] The court of appeals also rejected petitioners' claims based on the jury instructions, allegedly prejudicial publicity, and the admission of evidence of the procurement officials' guilty pleas. Pet. App. 14a-15a. They do not renew those arguments here.

fraudulent scheme to obtain confidential government procurement information is covered by Section 1343. See *United States* v. *Perholtz*, 842 F.2d 343, 367 (D.C. Cir.) ("appropriating the confidential information concerning the [procurement] specifications and then leaking it to [a bidder] * * * skewed the bidding process and directly impinged upon the government's economic interests"), cert. denied, 488 U.S. 821 (1988).[9]

The same principle applies to Section 641. The phrase "thing of value" in Section 641 readily encompasses intangible property, such as confidential information. That construction accords with the statute's purpose to provide comprehensive protection to the government's property rights. As this Court has noted, "[t]he history of § 641 demonstrates that it was to apply to acts which constituted larceny or

---

[9] Petitioners argue (Pet. 17 n.19) that *Carpenter* protects only private business information and that its holding is inapplicable to "government information, which is presumptively non-secret." There is no presumption of nonsecrecy about government procurement information, however, when the government enters the private market to purchase goods or services. In that context, the government acts in a proprietary capacity and has just as much interest in ensuring the integrity and confidentiality of its competitive bidding procedures as any private entity. Nor is the government's interest in protecting the confidentiality of information limited to the procurement context. See, *e.g.*, *John Doe Agency* v. *John Doe Corp.*, 493 U.S. 146 (1989) (information compiled for law enforcement purposes); *United States* v. *Reynolds*, 345 U.S. 1, 7-8 (1953) (military and state secrets). We note that petitioners did not claim in the court of appeals that Section 1343 is inapplicable to government information. See note 7, *supra*.

embezzlement at common law and also acts which shade into those crimes but which, most strictly considered, might not be found to fit their fixed definitions." *Morissette* v. *United States*, 342 U.S. 246, 269 n.28 (1952); see also *Bell* v. *United States*, 462 U.S. 356, 360 (1983) (the phrase "thing of value" in 18 U.S.C. 2113(b) encompasses intangible property and "is thus broader than common law larceny").[10] Section 641's application to information is therefore clear; there is no ambiguity (Pet. 15) calling for application of the rule of lenity. *Moskal* v. *United States*, 111 S. Ct. 461, 465 (1990) (refusing "to deem a statute 'ambiguous' for purposes of lenity merely because it [is] *possible* to articulate a construction more narrow than that urged by the Government").[11]

---

[10] Petitioners err in relying (Pet. 14-15) on *Dowling* v. *United States*, 473 U.S. 207 (1985). That case held that the interstate transportation of records containing copyright-infringing performances did not constitute interstate transportation of "goods, wares, [or] merchandise" with knowledge that they were stolen or converted, in violation of 18 U.S.C. 2314. That holding responded to Section 2314's specific language, its narrow focus on the protection of physical goods, and concerns to avoid undermining Congress's scheme for protecting copyrights. 473 U.S. at 214-227. None of those considerations applies here.

[11] Petitioners argue that if Section 641 is construed to bar the misappropriation of confidential government information, it would give rise to difficult First Amendment questions. Pet. 15. There is, however, no First Amendment issue raised by punishing those who appropriate confidential procurement information in order to subvert the government's competitive bidding process. And, because "Section 641 applies only to those conveyances of government property made 'without authority' * * * many officials may routinely pass on

b. The courts of appeals have repeatedly upheld convictions under Section 641 for the wrongful acquisition of government information. See *United States* v. *Fowler*, 932 F.2d 306, 309-310 (4th Cir. 1991) (upholding Section 641 conviction of a defendant who misused information obtained from copies of classified documents; court rejected the argument that information in a document is not a "thing of value" under Section 641); *United States* v. *Barger*, 931 F.2d 359, 368-369 (6th Cir. 1991) (upholding Section 641 conviction of a defendant who obtained a DEA manual relating to a rival motorcycle gang; "[c]learly, the value of the * * * manual is in the information contained therein" and that is "enough to meet the property or 'thing of value' element of the statute"); *United States* v. *Jeter*, 775 F.2d 670, 679-682 (6th Cir. 1985) (upholding Section 641 conviction of defendant who illegally obtained and distributed carbon copies of secret grand jury documents and proceedings; court noted that "Congress' very use of the more expansive 'thing of value' rather than 'property' strongly implies coverage beyond mere tangible entities"), cert. denied, 475 U.S. 1142 (1986); *United States* v. *Girard*, 601 F.2d 69, 70-71 (2d Cir.) (upholding conviction of a former DEA agent who obtained and distributed confidential law enforcement records;

---

government information without running afoul of the statute." *United States* v. *Jeter*, 775 F.2d 670, 681 (6th Cir. 1985), cert. denied, 475 U.S. 1142 (1986). As the Second Circuit has stated, "[i]n view of the statute's plainly legitimate sweep," any First Amendment issues at the margins can "be cured on a case by case basis." *United States* v. *Girard*, 601 F.2d 69, 72, cert. denied, 444 U.S. 871 (1979).

"[a]lthough the content of a writing is intangible, it is nonetheless a thing of value"), cert. denied, 444 U.S. 871 (1979).[12]

Petitioners argue (Pet. 12-13) that the Ninth Circuit has rejected the application of Section 641 to government information. The cases cited by petitioners, however, did not require the Ninth Circuit to consider whether Section 641 covers the conversion of government information. In *Chappell* v. *United States*, 270 F.2d 274 (9th Cir. 1959), an Air Force sergeant was prosecuted for converting to his own use the services and labor of an airman who was ordered to paint private apartments that the sergeant owned. Based on its analysis of the common law tort of conversion, the court of appeals concluded that the airman's "services and labor" were not a "thing of value" under Section 641. 270 F.2d at 276-278. In *United States* v. *Tobias*, 836 F.2d 449, 451 (9th Cir.), cert. denied, 485 U.S. 991 (1988), the court indicated that Section 641 does not apply to "intangible goods" such as "classified information." That statement, however, was dictum, because the court held that the cryptographic cards that the defendant had converted

---

[12] See also *United States* v. *May*, 625 F.2d 186, 191-192 (8th Cir. 1980) (intangible property is covered by Section 641; holding that evidence of salaries of personnel involved in unauthorized flights on government aircraft was properly admitted); cf. *United States* v. *DiGilio*, 538 F.2d 972, 976-978 (3d Cir. 1976) (affirming Section 641 conviction of defendant who obtained confidential information and documents from FBI files, because the copies were made with government resources, equipment, and supplies; reserving question whether information alone is protected by Section 641), cert. denied, 429 U.S. 1038 (1977).

in that case constituted "tangible property." 836 F.2d at 452. Accordingly, *Chappell* and *Tobias* did not deal with claimed appropriations of government information and do not conflict with the court of appeals' decision in this case.[13]

Nor is there a conflict concerning the application of the wire fraud statute to schemes to obtain government information. The only circuit that has addressed the issue squarely has held that such schemes violate the counterpart mail fraud statute. *United States* v. *Perholtz*, 842 F.2d at 367.[14]

---

[13] Moreover, despite the statement in *Tobias* that the Ninth Circuit recognizes an " 'intangible goods' or 'classified information' " exception to Section 641, 836 F.2d at 451, the Ninth Circuit has never applied such an exception to government information, and it has affirmed a conviction under Section 641 for converting the "information contained" in grand jury transcripts. *United States* v. *Friedman*, 445 F.2d 1076, 1087, cert. denied, 404 U.S. 958 (1971). A different panel of that court has also noted that the continued validity of *Chappell*'s narrow construction of Section 641 has been "seriously undermined." *United States* v. *Schwartz*, 785 F.2d 673, 681 n.4, cert. denied, 479 U.S. 890 (1986). *Tobias*'s expression (836 F.2d at 451 n.2) of disagreement with *Schwartz* indicates that the issue may well warrant further consideration by the Ninth Circuit in a case that squarely presents the issue; it does not suggest that there is a circuit conflict ripe for this Court's review.

[14] The mail fraud cases cited by petitioners (Pet. 17 n.19) have no relevance to this case. Those cases applied the rule of *McNally* v. *United States*, 483 U.S. 350 (1987), that the mail fraud statute does not cover schemes to deprive governments or employers of "intangible rights," such as the right to loyal service or the right to receive accurate information. None of those cases involved a private party's fraudulent acquisition of government procurement information. See *United States* v.

2. Petitioners further contend (Pet. 18-24) that, even if government information constitutes "property," the unauthorized acquisition of such information violates the theft and wire fraud statutes only when disclosure of the information is specifically prohibited by a statute or a published regulation. That contention lacks merit.

a. Section 641 does not require the existence of a published regulation prohibiting disclosure in order to render the converted use of government information unlawful, or the conveyance of the information to be "without authority," 18 U.S.C. 641. There is no legal requirement that the conversion of personal property be prohibited by statute or published regulation to come with Section 641, and there is no basis for creating a different rule for informational property. The issue is whether the release and conversion of the information in question was unauthorized; here, the evidence was sufficient to establish that the procurement information at issue was not to be released to persons such as petitioners.[15]

Kato, 878 F.2d 267, 269 (9th Cir. 1989) ("government's right to accurate information [from an applicant for a pilot's license] constitutes an intangible right"); *United States* v. *Slay*, 858 F.2d 1310, 1316 (8th Cir. 1988) ("[w]ithholding valuable information from the City is not the same thing as depriving the City of its property"); *United States* v. *Conover*, 845 F.2d 266, 271 (11th Cir. 1988) (no showing that employee who breached his fiduciary duty "maintained confidential business information").

[15] The jury was properly instructed on that issue. With respect to Section 641, the jury was instructed that conversion includes the use of someone else's property in an unauthorized

First, both published and unpublished government regulations specifically prohibited Navy officials from releasing the procurement-sensitive information that petitioners surreptitiously acquired. The FARs, which are published, covered nondisclosure of (1) the contents of competitors' proposals; (2) the evaluators' rankings, scores, and comments; and (3) the UYQ-21 Source Selection Plan. Internal Navy directives prohibited release of the ATACC weights and the FOCS acquisition plan.[16] Gov't C.A. Br. 31 n.18; see notes 1, 2, 3, 4, and 5, *supra*. Moreover, government procurement officials testified to an unbroken practice against release of such information.[17] C.A. App. 359, 361-363, 396, 430, 433, 436, 443-446.

---

manner, and "it would be a misuse of procurement sensitive information if confidential procurement information was released and if the defendant knowingly and willfully sought release of the information while knowing that such release was not authorized." C.A. App. 188. The jury was also instructed that to convey information " 'without authority' means that the conveyance was made to someone other than an authorized person and was made without the permission and consent of a Government official who is actually authorized to give that permission." *Id.* at 188-189.

[16] Those formal written directives, although not published, were available to the public. See C.A. App. 584-585. Petitioners suggest (Pet. 19, 21) that, absent published regulations, officials would have the power to impose arbitrary and abusive restrictions on the release of government information. The existence of written nondisclosure regulations, whether or not published, removes concerns about arbitrary enforcement.

[17] The courts below properly allowed government officials to testify that they did not release to bidders the procurement-sensitive information that petitioners obtained. A comprehensive system for protecting confidential information is likely to

The evidence also indicated that marketing executives with the level of experience possessed by petitioners would have known of those prohibitions. Many of the documents contained legends restricting disclosure, and petitioners' own conduct attests to their knowledge that they were seeking information that was not authorized to be released. Petitioners did not directly ask the government for information about the relative standing of bidders in their competitive procurements or about the government's internal selection process; rather, they had Litton pay a consultant, Muldoon, to use indirect means to obtain that information. Later, when Muldoon provided information about Litton's poor prospects in the ATACC procurement, McAusland did not withdraw Litton's bid, because he knew that Litton was not supposed to know that information and withdrawing the bid might reveal that Litton had obtained information it was not authorized to have. McAusland later stated that getting his competitors' bids would be "playing with fire." Similarly, Pafort arranged a personal meeting with Muldoon to avoid discussing information by phone, and he acknowledged at trial that asking for competitors' rankings and technical evaluations would be incorrect. Pet. App. 13a.

Petitioners suggest (Pet. 21, 23 n.28) that the absence of published regulations subjected them to "an intolerable risk of unfair surprise." The jury was

---

leave at least some room for discretionary exceptions; the testimony here simply established that, to the extent there was residual discretion to release the information, government officials had a consistent practice not to do so with respect to the information obtained by petitioners.

required to find, however, that petitioners specifically intended to obtain information whose release was unauthorized and that petitioners knew they were doing so. The jury was instructed that, in order to convict, it had to find that (1) petitioners acted knowingly and with "the specific intent to do something the law forbids, that is to say, with bad purpose, either to disobey or to disregard the law," C.A. App. 183; (2) petitioners "knew that the release of the material they sought was unauthorized," C.A. App. 185; and (3) petitioners "knowingly and willfully sought release of the information while knowing that such release was not authorized," C.A. App. 188. These requirements "relieve the statute of the objection that it punishes without warning an offense of which the accused was unaware." *Screws* v. *United States*, 325 U.S. 91, 102 (1945); *Boyce Motor Lines, Inc.* v. *United States*, 342 U.S. 337, 342 (1952); *United States* v. *Ragen*, 314 U.S. 513, 524 (1942); *Gorin* v. *United States*, 312 U.S. 19, 26-28 (1941).[18]

b. Petitioners contend (Pet. 19-20 & n.23) that the court of appeals' decision conflicts with *United States* v. *Girard*, *supra*. That claim is unfounded. In *Girard*, a DEA agent and a former DEA agent were convicted under Section 641 for selling information

---

[18] Petitioners argue in passing (Pet. 23-24) that a published-regulation requirement should exist for Section 1343. In *Carpenter* v. *United States*, however, the Court indicated that private business information is protected "property" without regard to written rules; "the declaration to that effect in the employee manual merely removed any doubts on that score and made the finding of specific intent to defraud that much easier." 484 U.S. at 28. The same principle applies to schemes to appropriate confidential government information.

from DEA computer files to a third party. In rejecting the defendants' vagueness challenge to Section 641, the court of appeals stated that the defendants "must have known that the sale of DEA confidential law enforcement records was prohibited." 601 F.2d at 71. The court added that "[t]he DEA's own rules and regulations forbidding such disclosure may be considered as both a delimitation and a clarification of the conduct proscribed by the statute." *Ibid.* The relevant "rules and regulations," which were described in the district court's opinion, consisted of published regulations of the Justice Department and an unpublished DEA Agents' Manual that "further particularizes when a disclosure of information is improper." *United States* v. *Lambert*, 446 F. Supp. 890, 900 (D. Conn. 1978).[19] *Girard* therefore does not impose a publication requirement; it holds only that the defendants must have adequate notice that disclosure is forbidden, whatever the source of that notice.[20]

---

[19] The *Lambert* court also stated that, to alleviate vagueness concerns, Section 641 should be interpreted to bar "only transfers of information affirmatively prohibited by other federal statutes, administrative rules and regulations, *or, perhaps, longstanding government practices.*" 446 F. Supp. at 899 (emphasis added). Nothing in the Second Circuit's opinion rejects that approach; rather, the court of appeals affirmed on the facts before it and characterized the district court's opinion as "well-reasoned." 601 F.2d at 70.

[20] That is the way the decision has been read in the Second Circuit. See *United States* v. *Jones*, 677 F. Supp. 238, 241 (S.D.N.Y. 1988) (visitor to prosecutor's office could be charged under Section 641 for attempting to sell information he overhead about an ongoing criminal investigation; "[g]iven the

Nor does the decision below conflict with the Sixth Circuit's ruling in *United States* v. *Jeter*, *supra*. The passage in the *Jeter* opinion cited by petitioners (Pet. 20) simply "follow[ed] the lead of *Girard* in deeming the instant application of Section 641 inappropriate for First Amendment overbreadth (or Fifth Amendment vagueness) scrutiny." 775 F.2d at 682. The court of appeals made no mention of petitioners' contention that a rule of nondisclosure must be based on published regulations. More recently, in *United States* v. *Barger*, 931 F.2d at 368-369, the Sixth Circuit upheld a conviction for a private party's wrongful acquisition of a DEA manual containing information about an ongoing investigation, relying explicitly on the agency's practice (not a published rule) to restrict disclosure of the manual.[21]

In any event, even if the circuits were in conflict on the issue presented by petitioners, the conflict would not warrant this Court's review, because the application of Section 641 to conduct of the sort

---

government's *long standing practice* of maintaining the confidentiality of information relevant to on-going criminal investigations, * * * the defendant could reasonably know the proscribed nature of his alleged actions") (emphasis added).

[21] In rejecting the claim that the government had failed to prove that the defendant's possession was "without authority," the court of appeals in *Barger* cited the defendant's admission that he was not supposed to have the DEA manual; the DEA's practice to distribute the manual only to law enforcement personnel with "a special need to know"; and the legend in the manual stating that "only certain people with certain needs are authorized to possess it." *United States* v. *Barger*, 931 F.2d at 368-369. Petitioners' implication (Pet. 20 n.24) that the court relied on a published regulation is incorrect.

involved in this case is not of continuing importance. In 1988, Congress enacted the Office of Federal Procurement Policy Act Amendments, Pub. L. No. 100-679, § 6, 102 Stat. 4063 (Procurement Integrity Act), codified at 41 U.S.C. 423 (Supp. II 1990). That Act specifically prohibits employees of a company involved in a federal agency procurement application from obtaining "directly or indirectly, from any officer or employee of such agency any proprietary or source selection information" regarding a procurement. 41 U.S.C. 423(j)(1) (Supp. II 1990). Section 423(p)(6) defines "proprietary information" to include both "information contained in a bid or proposal" and "cost or pricing data." Section 423(p)(7) defines "source selection information" as, *inter alia*, "information determined by the head of the agency or the contracting officer to be information * * * the disclosure of which to a competing contractor would jeopardize the integrity or successful completion of the procurement concerned" and that is required to be kept secure in order to prevent disclosure.[22]

Because the Procurement Integrity Act specifically prohibits employees of bidders (like petitioners) from obtaining information about their competitors' bids and the government's internal procurement

---

[22] Petitioners refer (Pet. 27 & n.38) to congressional statements indicating that some legislators believed that the Procurement Integrity Act filled a gap in existing law. Those statements are not probative of the scope of laws, such as Section 641, enacted by prior Congresses. See *Fort Stewart Schools* v. *FLRA*, 495 U.S. 641, 650 (1990) ("There is no conceivable persuasive effect in legislative history that may reflect nothing more than the speakers' incomplete understanding of the world upon which the statute will operate.").

processes, future prosecutions similar to this case can be brought under the Procurement Integrity Act. The availability of that Act diminishes the significance of the question whether the same conduct would independently violate Section 641. Accordingly, there is no need for the Court to consider the issues raised by petitioners concerning the application of Section 641 to the information that they obtained.[23]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WILLIAM C. BRYSON
Acting Solicitor General

JOHN C. KEENEY
Acting Assistant Attorney General

LOUIS M. FISCHER
Attorney

MARCH 1993

---

[23] Petitioners suggest (Pet. 25-30) that the Court should grant review because of the possible chilling effect on information-gathering efforts by journalists and others. The prospect that Section 641 might chill legitimate efforts to obtain information from the government is remote and speculative. Petitioners cite no instance in which Section 641 has been applied to such a case, and, in light of the stringent knowledge and willfulness requirements applicable to Section 641, it is difficult to imagine how the provision could be a trap for the innocent. The procurement fraud involved in this case raises no such far-reaching concerns. Cf. *United States* v. *Jeter*, 775 F.2d at 682 (reserving issue of "the constitutionality of Section 641 in a 'Pentagon Papers' kind of situation").

Supreme Court, U.S.
FILED
MAR 8 1993
OFFICE OF THE CLERK

No. 92-960

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

THOMAS D. MCAUSLAND AND CHRISTOPHER M. PAFORT,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF OF AMICI CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

Kate Martin
American Civil Liberties
Union Foundation
122 Maryland Ave., N.E.
Washington, D.C. 20002
(202) 675-2327

Steven R. Shapiro
American Civil Liberties
Union Foundation
132 West 43rd Street
New York, NY 10036
(212) 944-9800

Mark H. Lynch*
Covington & Burling
1201 Pennsylvania Avenue, N.W.
Post Office Box 7566
Washington, D.C. 20044
(202) 662-6000

Sheryl Walter
National Security Archive
1755 Mass. Avenue, N.W.
Washington, D.C. 20036
(202) 797-0882

Attorneys for Amici Curiae
** Counsel of Record*

March 1993

ISSUE PRESENTED

Under the First Amendment, may the government prosecute private citizens for acquiring and using unclassified government information, in the absence of a statute that clearly applies to such information?

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF AMICI 2

REASONS FOR GRANTING THE WRIT 4

I. THE JUDGMENT BELOW RAISES AN IMPORTANT FIRST AMENDMENT ISSUE 6

II. ONLY CONGRESS CAN DECIDE WHETHER CRIMINAL PENALTIES ATTACH TO THE ACQUISITION AND USE OF GOVERNMENT INFORMATION, AND NEITHER SECTION 641 NOR SECTION 1343 WAS INTENDED TO HAVE THAT REACH 10

CONCLUSION 15

TABLE OF AUTHORITIES

Cases	*Page*
Ashton v. Kentucky, 384 U.S. 195 (1966)	11
Butterworth v. Smith, 494 U.S. 624 (1990)	7
Carpenter v. United States, 484 U.S. 19 (1987)	12
Department of the Air Force v. Rose, 425 U.S. 352 (1976)	10
Dowling v. United States, 473 U.S. 207 (1985)	10
Garner v. Louisiana, 368 U.S. 157 (1961)	11, 12
Grayned v. City of Rockford, 408 U.S. 104 (1972)	9
Grosjean v. American Press Co., 297 U.S. 233 (1936)	6
Kent v. Dulles, 357 U.S. 116 (1958)	11
Kolender v. Lawson, 461 U.S. 352 (1983)	8

Cases (continued) ***Page***

Leathers v. Medlock,
111 S. Ct. 1438 (1991) 6

McNally v. United States,
483 U.S. 350 (1987) 10, 12

Mills v. Alabama,
384 U.S. 214 (1966) 6

NAACP v. Button,
371 U.S. 415 (1963) 9

Patterson v. Colorado,
205 U.S. 454 (1907) 8

Pell v. Procunier,
417 U.S. 817 (1974) 6

United States v. Computer Sciences Corp.,
689 F.2d 1181 (4th Cir. 1982),
cert. denied, 459 U.S. 1105 (1983) 11

United States v. Morison,
844 F.2d 1057 (4th Cir.),
cert. denied, 488 U.S. 908 (1988) 6, 7

United States v. Truong Dinh Hung,
629 F.2d 908 (4th Cir. 1980),
cert. denied, 454 U.S. 1144 (1982) 11

Vance v. Universal Amusement Co.,
445 U.S. 308 (1980) 9

Statutes **Page**

5 U.S.C. § 552 (1988) 10

17 U.S.C. § 105 (1988) 10

18 U.S.C. § 641 (1988) 4, 11

18 U.S.C. § 1341 (1988) 11

18 U.S.C. § 1343 (1988) 4

18 U.S.C. § 1902 (1988) 13

18 U.S.C. § 1905 (1988) 13

18 U.S.C. §§ 1906-1908 (1988) 13

18 U.S.C. § 2511(1)(c) (1988) 13

26 U.S.C. § 7213 (1988) 13

41 U.S.C. § 423(a) (1988) 13

50 U.S.C.A. App. §§ 5, 16 (1988) 10

Pub. L. No. 97-200, 96 Stat. 122,
50 U.S.C. § 421 (1988) 13, 14

Legislative

H.R. Rep. No. 580, 97th Cong., 2d Sess. (1982) 14

Miscellaneous

Writings of James Madison 103 (G. Hunt ed. 1910) 6

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

No. 92-960

THOMAS D. MCAUSLAND
AND CHRISTOPHER M. PAFORT,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF AMICI CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

Amici curiae, the American Civil Liberties Union, the American Society of Newspaper Editors, the Federation of American Scientists, the National Newspaper Association, the National Security Archive, the Newsletter Publishers Association, Inc., the Newspaper Guild, the Radio-Television News Directors Association, and the Reporters Committee for Freedom of the Press, submit this brief in support of the petition for certiorari. As set forth more fully below, this case is of exceptional importance because the

decision of the court of appeals (1) imperils the ability of the press and the public to acquire and use government information, and (2) represents an unwarranted expansion of criminal statutes by the executive and judicial branches into an area of First Amendment sensitivity that Congress never intended to reach.

INTEREST OF AMICI

The American Civil Liberties Union (ACLU) is a nationwide, non-partisan organization of over 275,000 members, dedicated to the protection of civil rights and civil liberties. The ACLU has a long history of promoting individual rights, including rights associated with the First Amendment. In particular, the ACLU has tried to ensure that the United States government, whatever party may be in power, remains open to the people and that government information, except in the most limited circumstances, remains available to inform public debate.

The American Society of Newspaper Editors is a nationwide, professional organization of more than 950 persons who hold positions as directing editors of daily newspapers throughout the United States.

The Federation of American Scientists is a national organization of scientists and engineers concerned with issues of science and national security policy. The Federation's research and advocacy function is predicated on the acquisition, analysis and dissemination of government information.

The National Newspaper Association (NNA) is a national trade association representing the interests of weekly and daily newspapers throughout the country. Founded in 1885 and with almost 5,000 members, NNA is the oldest and largest national trade association in the newspaper industry. For more than a century, a major concern of NNA has been to ensure that political and commercial information be distributed in an open and robust manner.

The National Security Archive is a non-profit, non-partisan foreign policy research institute and library that collects and publishes declassified and unclassified government documents. The Archive is dedicated to promoting freedom of information through broad public access to and dissemination of government records so that the information in such documents is widely available for the effective exercise of individuals' First Amendment rights through informed public debate and so that such information is preserved as a contemporaneous account of our nation's history for the future.

The Newsletter Publishers Association, Inc. represents 700 publishers of approximately 2,200 newsletters and specialized information services. Many of these newsletters report on the activities of government agencies and actively gather information about those agencies.

The Newspaper Guild, a labor organization representing 40,000 employees of newspapers, magazines, and related enterprises in the United States and Canada, has long been active in protecting the First Amendment rights of journalists and others.

The Radio-Television News Directors Association is the principal professional organization of journalists – executives, editors, reporters and others – who gather and disseminate news and other information on radio and television in the United States.

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of working reporters and editors dedicated to defending the First Amendment and freedom-of-information interests of the news media and public. The Reporters Committee has provided representation, legal guidance and research in virtually every major freedom of the press case litigated since 1970.

REASONS FOR GRANTING THE WRIT

Petitioners were convicted under the theft of government property statute, 18 U.S.C. § 641 (1988), the wire fraud statute, 18 U.S.C. § 1343 (1988), and related conspiracy counts, for obtaining unclassified information concerning certain Department of Defense procurements in which their employer had an interest. Although petitioners had no intention of sharing this information with the public, procurement information can be of genuine news interest, particularly to the specialized trade press, and is the sort of information that some of the amici regularly seek out and publish.

The court below held that sections 641 and 1343 are applicable here because Federal Acquisition Regulations (FAR's), unpublished directives and internal government policies and practices put petitioners on notice that they were without authority to acquire or use the information

at issue. This theory of liability is inconsistent both with the First Amendment and the doctrine of separation of powers. To define the reach of sections 641 and 1343 by reference to departmental regulations and internal practices renders them unconstitutionally vague and overbroad. Furthermore, these statutes do not on their face apply to government information, and they certainly do not reflect a considered congressional judgment that control of government information should be enforced with criminal sanctions. The decision below therefore represents an unwarranted judicial usurpation of the legislative process, a development that is particularly dangerous in the constitutionally sensitive area of government information.

As a practical matter, the judgment below puts the press and other members of the public who seek out and use government information in an impossible position when deciding what information they may lawfully acquire and use, because those decisions must turn on a body of informal directives, policies and practices that can be ascertained only with great difficulty, if at all. Furthermore, the informality of the standards used to define criminal liability vests unprecedented discretion in the hands of government officials. The theory of liability sustained in this case does not merely chill First Amendment rights, it paralyzes reporters, editors, researchers, academics and plain citizens who seek to learn and communicate about government activity.

I. THE JUDGMENT BELOW RAISES AN IMPORTANT FIRST AMENDMENT ISSUE

This Court has stated that "there is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs." *Mills v. Alabama*, 384 U.S. 214, 218 (1966). Such discussion would be hollow and ill-informed without the public's ability to acquire government information. As James Madison wrote: "A popular Government, without popular information, or a means of acquiring it, is but a Prologue to a Farce or a Tragedy; or perhaps both." 9 *Writings of James Madison* 103 (G. Hunt ed. 1910). Indeed, the First Amendment rests on the presumption that "informed public opinion is the most potent of all restraints upon misgovernment." *Grosjean v. American Press Co.*, 297 U.S. 233, 250 (1936).

As the Court has recognized, "[t]he press plays a unique role as a check on government abuse." *Leathers v. Medlock*, 111 S. Ct. 1438, 1443 (1991). Although the press often acts as a surrogate for the public in acquiring government information, *see United States v. Morison*, 844 F.2d 1057, 1081 (4th Cir.) (Wilkinson, J. concurring), *cert. denied*, 488 U.S. 908 (1988), members of the public are no less the beneficiaries of the First Amendment protections than the press and are no less entitled to invoke these protections. *See Pell v. Procunier*, 417 U.S. 817, 833-34 (1974).

As construed by the court below, sections 641 and 1343 clearly "threaten to hinder the press [or any other citizen] as a watchdog of government activity." *Leathers*, 111 S. Ct. at 1444. As Judge Wilkinson has observed, "[t]here exists the tendency, even in a constitutional democracy, for government to withhold reports of disquieting developments

and to manage news in a fashion most favorable to itself." *Morison*, 844 F.2d at 1081 (concurring opinion). Applying sections 641 and 1343 to government information on the basis of administrative regulations, directives or practices places criminal sanctions behind that dangerous tendency.

The court of appeals' construction of sections 641 and 1343 arguably will criminalize the premature release of an innocuous public statement by a public official, the publication of the internal deliberations of a government body, and even the exposure of government corruption – as long as the responsible government official (perhaps the corrupt official) has not given permission for the disclosure. Not only the disclosure of such information by government officials, but also its receipt by the press or other members of the public, would be a crime. Yet "the publication of information relating to alleged government misconduct [is] speech which has traditionally been recognized as lying at the core of the First Amendment." *Butterworth v. Smith*, 494 U.S. 624, 632 (1990).

The press and other researchers have an important role in informing the public about the operations of government. Oftentimes, reporters and others obtain and publish information that high government officials have tried to keep secret. In the case of government misconduct or corruption, for example, the relevant government information will not often be provided by those "authorized" to disclose it. Yet, under the court of appeals' interpretation of sections 641 and 1343, a reporter who acquired and used such information, as well as the newspaper that published it, might be subject to prosecution. On the court of appeals' interpretation, the government would be able to prosecute not only government officials and defense

contractors, but also any citizen who studies and reports on the operations of government, whenever they acquire and use information that certain government officials direct their subordinates to conceal, for whatever reason, from the public.

Under the decision below, the only sure way for a reporter or other citizen to be confident that use of government information acquired other than through official channels is not proscribed by internal directives, policies or practices is to ask government officials in advance of publication. This procedure is impractical because it gives to those who are the subject of scrutiny a veto over what information may be used. It is also antithetical to the First Amendment because coercing the press and public, with the threat of criminal prosecution, to seek prior approval for publication is a form of prior restraint. Yet "the main purpose" of the First Amendment was "to prevent all such *previous* restraints upon publications as had been practiced by other governments." *Patterson v. Colorado*, 205 U.S. 454, 462 (1907) (emphasis in original).

As construed by the court of appeals, sections 641 and 1343 are both unconstitutionally vague and overbroad. To avoid the vice of vagueness, "a penal statute [must] define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). In the First Amendment context, a statute that turns on departmental regulations and practices cannot meet these requirements. For private citizens, distinguishing between government information that is lawful to acquire and use and information that is criminally

proscribed must not be made to depend on a comprehensive knowledge of the Code of Federal Regulations and daily review of the Federal Register. The decision below, however, holds that unpublished agency directives and even agency practices are sufficient to define the reach of criminal statutes.

A statute is overbroad when it proscribes the disclosure or acquisition of information that is harmless and protected by the First Amendment as well as information that might lawfully be regulated because of a compelling interest in secrecy. *See Grayned v. City of Rockford*, 408 U.S. 104, 114 (1972). Contract procurement information is the present focus of government attention, but the government has not suggested that the information defendants acquired represents any limiting principle on the applications of sections 641 and 1343. This Court has repeatedly warned of "the . . . 'danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application.'" *Vance v. Universal Amusement Co.*, 445 U.S. 308, 315 n.12 (1980) (per curiam) (*quoting NAACP v. Button*, 371 U.S. 415, 433 (1963)). By extending sections 641 and 1343 to encompass a vast array of government information, the executive branch would achieve just such a result.

II. ONLY CONGRESS CAN DECIDE WHETHER CRIMINAL PENALTIES ATTACH TO THE ACQUISITION AND USE OF GOVERNMENT INFORMATION, AND NEITHER SECTION 641 NOR SECTION 1343 WAS INTENDED TO HAVE THAT REACH

Government information is presumptively public information. That judgment is reflected in the Copyright Act, 17 U.S.C. § 105 (1988), which denies the government the protections of copyright, and in the Freedom of Information Act, 5 U.S.C. § 552 (1988), which requires public disclosure of all agency records, subject to nine specific exemptions. *See Department of the Air Force v. Rose*, 425 U.S. 352, 360-61 (1976). The presumption, of course, can be overcome, but only Congress has the authority to make the essentially legislative decision as to what categories of government information will be the subject of criminal penalties.[1]

It is a fundamental principle of due process, separation of powers and the canons of statutory construction that courts will not extend any criminal statute to conduct when it is uncertain whether the legislature intended to reach that conduct. *See McNally v. United States*, 483 U.S. 350, 359-60 (1987); *Dowling v. United States*, 473 U.S. 207, 213-14 (1985). When, as here, the statute affects interests protected by the First Amendment, this rule has special force and the legislative intent must be especially clear.

---

[1] Congress did not delegate such decisions to the President under sections 641 and 1343 as it has in other statutes. *See, e.g.*, Trading With the Enemy Act, 50 U.S.C.A. App. §§ 5, 16 (1988).

See Ashton v. Kentucky, 384 U.S. 195, 200-01 (1966); *Kent v. Dulles*, 357 U.S. 116, 129-30 (1958).

Justice Harlan explained this point well when he wrote that government cannot criminalize conduct that is within the range of First Amendment protection by means of a "general and all-inclusive ... prohibition." *Garner v. Louisiana*, 368 U.S. 157, 202 (1961) (concurring opinion). Instead, the legislature must enact a statute that is "narrowly drawn to define and punish specific conduct as constituting a clear and present danger to a substantial interest of the State." *Id.* (*quoting Cantwell v. Connecticut*, 310 U.S. 296, 311 (1940)). This limitation is justified

> "not because control of such activity is beyond the power of the State, but because sound constitutional principles demand of the ... legislature that it focus on the nature of the otherwise 'protected' conduct it is prohibiting, and that it then make a legislative judgment as to whether that conduct presents so clear and present a danger to the welfare of the community that it may legitimately be criminally proscribed." *Id.* at 203 (footnote omitted).

Congress clearly did not make any such considered judgment when it enacted sections 641 and 1343. "[T]he legislative history reveals that Congress has never directly considered the application of § 641 to government information." *United States v. Truong Dinh Hung*, 629 F.2d 908, 923 (4th Cir. 1980) (separate opinion of Winter, J.), *cert. denied*, 454 U.S. 1144 (1982). The same is also true of section 1343. The wire fraud statute is based on its older sibling, the mail fraud statute, 18 U.S.C. § 1341 (1988). *See*

United States v. Computer Sciences Corp., 689 F.2d 1181, 1188 n.14 (4th Cir. 1982), *cert. denied*, 459 U.S. 1105 (1983). That statute, which – like section 641 – was first enacted in the 19th century, "had its origin in the desire to protect individual property rights" and not government information. *McNally*, 483 U.S. at 359 n.8.

Both section 641 and section 1343 are "general and all-inclusive" statutes and neither reflects a specific congressional judgment that receipt of government information, as opposed to tangible government property, "presents so clear and present a danger to the welfare of the community that it may legitimately be criminally proscribed." *Garner*, 368 U.S. at 203. For the reasons stated by Justice Harlan in that case, these statutes should not be expanded to an area where First Amendment interests are at stake.[2]

The executive branch should not be permitted to expand the reach of general statutes such as sections 641 and 1343 to government information by mere reference to its own regulations and internal practices. To allow the executive branch to determine in its discretion what information falls within or without these broad statutes usurps the role of Congress in making the delicate legislative decisions as to what sorts of government information will be the subject of criminal penalties.

---

[2] This Court has held that the mail and wire fraud statutes apply to the conversion of proprietary information belonging to a private employer. *Carpenter v. United States*, 484 U.S. 19 (1987). That case is plainly distinguishable because here government information is at issue. None of the First Amendment interests implicated here were implicated in *Carpenter*.

Permitting the government to use sections 641 and 1343 to prosecute the acquisition of government information also upsets the precise and complex framework that Congress has constructed with regard to criminal penalties for such conduct. Congress has approached this issue with great caution. Putting aside the statutes dealing with information that is classified for reasons of national security (which is not involved here), Congress has criminalized the disclosure by government officials of only certain limited categories of government information and in most instances has not extended these statutes to the recipients of the information. *See* 18 U.S.C. § 1902 (1988) (crop reports); 18 U.S.C. § 1905 (1988) (trade secrets); 18 U.S.C. §§ 1906-1908 (1988) (bank examination information). Statutes criminalizing the use of government information by citizens not employed by the government are rare and are quite specific in the information to which they apply. *See* 18 U.S.C. § 2511(1)(c) (1988) (information obtained through electronic surveillance); 26 U.S.C. § 7213 (1988) (tax returns). In this case, the Court is confronted with the remarkable fact that Congress made the unauthorized use of procurement information a crime only *after* appellants engaged in the conduct for which they were convicted. 41 U.S.C. § 423(a) (1988).[3]

The care and delicacy with which Congress approaches the question of criminalizing the use of government information by those outside the government is best illustrated by the Intelligence Identities Protection Act of 1982, Pub. L. No. 97-200, 96 Stat. 122, 50 U.S.C. § 421 (1988). In that statute, Congress was dealing with one of the most sensitive categories of information our government maintains – the

---

[3] Amici take no position on whether that statute is constitutional.

identities of its covert intelligence agents whose very lives can depend on preserving their secrecy. With respect to individuals who learn the identities of intelligence agents through authorized access to classified information, the statute imposes criminal liability for the intentional and knowing disclosure of such identities. 50 U.S.C. § 421(a) and (b) (1988). However, with respect to individuals outside the government without authorized access to classified information, the statute applies only to those who disclose the identity of an agent "in the course of a pattern of activities intended to identify and expose covert agents and with reason to believe that such activities would impair or impede the foreign intelligence activities of the United States." 50 U.S.C. § 421(c) (1988).

This standard was adopted so that the statute would apply to those outside the government "only in very limited circumstances to deter those who make it their business to ferret out and publish the identities of agents." H.R. Rep. No. 580, 97th Cong., 2d Sess. 8 (1982), *reprinted in* 1982 U.S.C.C.A.N. 172. Congress did not, however, want the statute to "affect the First Amendment rights of those who disclose the identities of agents as an integral part of another enterprise such as news media reporting of intelligence failures or abuses, academic studies of U.S. government policies and programs, or a private organization's enforcement of its internal rules." *Id.*

The Intelligence Identities Protection Act demonstrates that even with respect to the most sensitive types of government information, as to which the strongest arguments for criminal penalties can be made, such penalties attach only in the most limited of circumstances. These complex balancing decisions must be left to Congress rather than

permitting the executive branch to decide what government information is proscribed through its ever-expanding use of broad statutes such as sections 641 and 1343.

CONCLUSION

For the reasons set forth above, the petition should be granted.

Respectfully submitted,

Kate Martin
American Civil Liberties
Union Foundation
122 Maryland Ave., N.E.
Washington, D.C. 20002
(202) 675-2327

Steven R. Shapiro
American Civil Liberties
Union Foundation
132 West 43rd Street
New York, NY 10036
(212) 944-9800

Mark H. Lynch*
Covington & Burling
1201 Pennsylvania Ave., N.W.
Post Office Box 7566
Washington, D.C. 20044
(202) 662-6000

Sheryl Walter
National Security Archive
1755 Mass. Avenue, N.W.
Washington, D.C. 20036
(202) 797-0882

Attorneys for Amici Curiae
** Counsel of Record*

March 1993

Supreme Court, U.S.
FILED
MAR 8 1993
OFFICE OF THE CLERK

No. 92-960

In the Supreme Court of the United States

OCTOBER TERM, 1992

THOMAS D. MCAUSLAND AND CHRISTOPHER M. PAFORT,
Petitioners

v.

UNITED STATES OF AMERICA,
Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF CONGRESSMAN DON EDWARDS AND CONGRESSMAN JOHN CONYERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

JAMES L. QUARLES III
DAVID A. WILSON
SEAN P. SHERMAN
Hale and Dorr
1455 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 393-0800

QUESTION PRESENTED

Whether a private citizen who obtains unclassified government information may be convicted of theft of government property (18 § U.S.C. 641) or wire fraud (18 U.S.C. § 1343) where disclosure of the information, although not prohibited by statute or published regulation, violates internal government rules, custom or practice.

TABLE OF CONTENTS

Page

INTEREST OF *AMICI CURIAE* 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE PETITION . . 3

I. THE COURT OF APPEALS' CONSTRUCTION OF SECTION 641's "WITHOUT AUTHORITY" LANGUAGE IS CONTRARY TO THE PRINCIPLES OF OPEN GOVERNMENT AND FREE ACCESS TO GOVERNMENTAL INFORMATION, AND IS INCONSISTENT WITH THE SEPARATION OF POWERS 4

A. Section 641 Must Be Construed Narrowly In Light Of Principles Of Open Government And Free Access To Government Information Embodied In The Constitution And In Numerous Statutes 4

B. The Availability Of Government Information Is Implicit In The Constitution 5

C. Congress Has Created A Presumption Of Access To Government Information 6

D. The Court Of Appeals' Reading Of "Without Authority" Is Contrary To Separation Of Powers Principles 9

1. Congress Is The Appropriate Entity To Determine Whether And When Disclosure Or Receipt Of Information May Be A Crime 9

2. Section 641 Cannot Apply To Information Whose Disclosure Is Not Prohibited By Statute Or Regulation . . . 9

II. INFORMATION IS NOT A "THING OF VALUE" UNDER SECTION 641 13

III. MEANS OTHER THAN IMPOSING CRIMINAL SANCTIONS ON THE RECIPIENT ARE AVAILABLE TO ENFORCE LEGITIMATE INTERNAL RESTRICTIONS ON DISSEMINATION OF GOVERNMENT INFORMATION 15

CONCLUSION 17

TABLE OF AUTHORITIES

Cases: Page

Department of the Air Force v. Rose, 425 U.S. 352 (1976) 6

FAA v. Robertson, 422 U.S. 255 (1975) 8

Garner v. Louisiana, 368 U.S. 157 (1961) 6

Kolender v. Lawson, 461 U.S. 352 (1983) 12

Liparota v. United States, 471 U.S. 419 (1985) 9, 12

Morissette v. United States, 342 U.S. 246 (1952) 13

NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214 (1978) 5

United States v. Bass, 404 U.S. 336 (1971) 9, 12

United States v. Gradwell, 243 U.S. 476 (1917) 9

United States v. Hubbard, 474 F. Supp. 64 (D.D.C. 1979) 6

United States v. Kozminski, 487 U.S. 931 (1988) 9, 13

TABLE OF AUTHORITIES - Continued

Page

United States v. Lacher, 134 U.S. 624 (1890) 9

United States v. Morison, 844 F.2d 1057 (4th Cir. 1988) 5

United States v. R.L.C., 112 S.Ct. 1329 (1992) 12

United States v. Tobias, 836 F.2d 449 (9th Cir. 1988), *cert. denied*, 485 U.S. 991 (1989) 13

United States v. Truong Dinh Hung, 629 F.2d 908 (4th Cir. 1980) 10, 13

Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976) 6

Statutes and regulations:

5 U.S.C. § 552 (1988) 6

5 U.S.C. § 552b (1977) 7

5 U.S.C. § 522(b) (1977) 8

5 U.S.C. § 552(b)(3) (1970) 8

TABLE OF AUTHORITIES - Continued

Page

5 U.S.C. § 552(b)(3) (1977) 8

5 U.S.C. § 551 (1977) 7

17 U.S.C. § 105 (1977) 6

18 U.S.C. § 641 (1976) 2

18 U.S.C. § 793 (1976) 7

22 U.S.C. §§ 2751-2796 (1990) 7

22 U.S.C. §§ 120.21, 121.1 7

41 U.S.C. § 423 (Supp. 1992) 2, 14

42 U.S.C. §§ 2161-2166 (1973) 7

50 U.S.C. §§ 421-26 (1991) 7

Pub. L. No. 100-679, § 6(b),
102 Stat. 4068 (1988) 14

Pub. L. No. 101-28, 103 Stat. 57
(1989) 15

Pub. L. No. 101-194, § 506(1),
103 Stat. 1759 (1989) 15

22 C.F.R. §§ 120.21, 121.1 7

TABLE OF AUTHORITIES - Continued

Page

Miscellaneous:

9 Writings of James Madison 103 (G. Hunt ed. 1910) 5

Benjamin DuVal, *The Occasions of Secrecy*, 47 U. Pitt. L. Rev. 579 (1986) 13, 16

Harold Edgar & Benno Schmidt, *Curtiss-Wright Comes Home: Executive Power and National Secrecy*, 21 Harv. C.R.-C.L.L. Rev. 349 (1986) 16

Potter Stewart, *Or of the Press*, 26 Hastings L.J. 631 (1975) 5, 15

Treatises:

89 C.J.S. *Trover and Conversion* § 11 (1955) 13

Legislative Materials:

135 Cong. Rec. H1876 (May 15, 1989) 15

135 Cong. Rec. S15960 (Nov. 17, 1989) 12

135 Cong. Rec. S15961 (Nov. 17, 1989) 14

TABLE OF AUTHORITIES - Continued

Page

135 Cong. Rec. S15992 (Nov. 17, 1989) 14

Oversight of DoD's Management of Inside Information in the Acquisition Process: Hearing Before the Subcommittee on Oversight of Governmental Affairs, United States Senate, 101st Cong., 1st Sess. (1989) 10, 11, 12

In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-960

THOMAS D. MCAUSLAND AND CHRISTOPHER PAFORT,
Petitioners,

v.

THE UNITED STATES OF AMERICA,
Respondent.

**On Petition for a Writ of Certiorari to
The United States Court of Appeals
for the Fourth Circuit**

BRIEF OF CONGRESSMAN DON EDWARDS AND CONGRESSMAN JOHN CONYERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF *AMICI CURIAE*

Congressman Don Edwards is Chairman of the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary. Congressman John Conyers is Chairman of the House Committee on Government Operations and is also a member of the House Committee on the Judiciary. In these positions, Congressmen Edwards and Conyers have a strong interest in and appreciation for the civil liberties and separation of powers issues raised by this petition. They believe that imposing criminal sanctions for the receipt of information from the government where there is no explicit statute or regulation forbidding the disclosure of this information threatens the principles of open government

and the separation of powers that they were elected, in part, to preserve.

Congressmen Edwards and Conyers believe that their perspective as Members of Congress may prove of assistance to the Court in its consideration of this petition. They submit this brief in support of Petitioners with the written consent of all parties. The written consents are on file with the Clerk of the Court.

STATEMENT OF THE CASE

Petitioners Thomas McAusland and Christopher Pafort were convicted of obtaining in 1987 and early 1988 unclassified government information related to bids on various defense contracts being sought by their employer, Litton Data Systems, Inc. Although Congress has subsequently enacted, and the President has signed into law, legislation that expressly forbids the giving and receiving of the kind of information obtained by Petitioners,[1] there was no statute or formal regulation restricting access to this information at the time of the actions in question.[2]

Nevertheless, the Justice Department prosecuted (and Petitioners were convicted) under the theory that no explicit statute or regulation restricting access to this information was required to find a violation of 18 U.S.C. § 641. Section 641 imposes criminal penalties on a person who "knowingly converts * * * or without authority, sells, conveys or disposes

---

[1] The Procurement Integrity Act of 1988, 41 U.S.C. § 423 (Supp. 1992).

[2] There is nothing in the record below to suggest that Petitioners received this information as a result of bribery or any other improper conduct.

of any * * * thing of value of the United States."[3] Petitioners' convictions were obtained on the theory that information is a "thing of value" under § 641 and that the acquisition of such information in contravention of an agency's internal, unpublished custom and practice of keeping information confidential was "without authority" and therefore a violation of Section 641.[4]

REASONS FOR GRANTING THE PETITION

This Court has never construed the term "without authority" in Section 641 or determined how or whether the statute applies to information. This case, therefore, raises issues of first impression that are of exceptional importance to the principles of open government and the separation of powers.

The Fourth Circuit's interpretation of the "without authority" element of Section 641 is incompatible with those principles. By elevating informal internal policies of a government agency to the level of criminal statutes, the Court of Appeals' formulation would permit any bureaucrat with the "authority" to restrict access to information to essentially enact a new criminal statute. This result flies in the face of the authority of Congress – not the judiciary, prosecutors or federal agencies – to determine the kinds of conduct that will be subject to criminal sanctions.

---

[3] The Government's theories under sections 371 and 1343 derived from the same notion that this information was "property" and that private individuals can be criminally liable for obtaining information whose disclosure violates an unpublished, internal government practice or policy, but no statute or regulation.

[4] Additional details concerning the background on this case are provided in the Statement contained in the Petition for a Writ of Certiorari which, in the interest of brevity, is adopted by *Amici*.

Moreover, the Fourth Circuit has incorrectly presumed that Congress intended that government information be considered a "thing of value" under Section 641. The statute contains no indication that it was intended to apply to information or to any other intangible item. Where Congress has intended to restrict access to information it has done so specifically and with precision. No such precision exists in Section 641.

Constitutional principles and numerous statutes enacted by the Congress reflect a presumption that government information should be made available to citizens. This presumption should only be overcome – and criminal sanctions should only be imposed – where Congress has clearly and unambiguously determined that the receipt of particular information should be restricted.

I. THE COURT OF APPEALS' CONSTRUCTION OF SECTION 641's "WITHOUT AUTHORITY" LANGUAGE IS CONTRARY TO THE PRINCIPLES OF OPEN GOVERNMENT AND FREE ACCESS TO GOVERNMENT INFORMATION, AND IS INCONSISTENT WITH THE SEPARATION OF POWERS

A. Section 641 Must Be Construed Narrowly In Light Of Principles Of Open Government And Free Access To Government Information Embodied In The Constitution And In Numerous Statutes

Even if government information can be a "thing of value" under Section 641, it would be absurd to assume that Section 641 covers *all* transfers of government information. The free transfer of information from the government to private individuals is pervasive and, unlike the transfer of other items that may be "things of value," is fundamental and beneficial to our system of government. Nonetheless, those in government will always attempt to impose limits on the public's access to information in order to obfuscate mistakes

and avoid embarrassment.[5] See *United States* v. *Morison*, 844 F.2d 1057, 1081 (4th Cir. 1988) (Wilkinson, J., concurring) ("There exists the tendency, even in a constitutional democracy, for government to withhold reports of disquieting developments and to manage news in a fashion most favorable to itself.") It was this realization, in part, which motivated the Founders to draft the First Amendment and provided the impetus for Congress' consideration and passage of numerous statutes reflecting a presumption in favor of open access to government information. Section 641 should be construed narrowly in light of that presumption.

B. The Availability Of Government Information Is Implicit In The Constitution

The principles of open government and free access to government information are part of the philosophical underpinnings of the United States Constitution. See *NLRB* v. *Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978) (availability of government information necessary to ensure an informed citizenry, which is "vital to the functioning of a democratic society, [and is] needed to check against corruption and to hold the governors accountable to the governed"). As James Madison wrote: "A popular Government, without popular information, or a means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both." *9 Writings of James Madison* 103 (G. Hunt ed. 1910) *(quoted in Morison*, 844 F.2d at 1081 (Wilkinson, J., concurring)). These principles inform not only the First

---

[5] Justice Stewart has described the tug and pull between the government and the press over information as a "contest": while the government may have internal policies against disclosure of certain types of information, parties outside the government are free to attempt to obtain and use that information. Potter Stewart, *Or of the Press*, 26 Hastings L.J. 631, 635-36 (1975). Congress may resolve this contest, making merely engaging in it illegal, only through "carefully drawn legislation." *Id.* at 636.

Amendment, but other constitutional provisions, such as the right to vote and to otherwise participate in the political process. They serve the goal of the First Amendment to "enlighten public decisionmaking in a democracy." *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council*, 425 U.S. 748, 765 (1976); See *United States* v. *Hubbard*, 474 F. Supp. 64, 80 (D.D.C. 1979) ("free exchange of ideas, especially ideas in possession of the government, is at the very heart of our first amendment guarantees"). They apply with equal force regardless of the reasons that information is sought and irrespective of the kind of information at issue. *Id.* (pursuit and exchange of commercial information "indispensable").

In light of the fundamental role of the dissemination of government information in our generally open system of government, the Court should read the "without authority" language narrowly. See *Garner* v. *Louisiana*, 368 U.S. 157, 202 (1961) (Harlan, J., concurring) (statutes criminalizing conduct touching on First Amendment principles must be "narrowly drawn to define and punish specific conduct as constituting a clear and present danger to a substantial interest of the State"). The Fourth Circuit's formulation – that "authority" can mean an informal custom and practice of an agency – is incompatible with these notions.

C. Congress Has Created A Presumption Of Access To Government Information

Numerous statutes reflect Congress' longstanding view that there is a presumption of open access to government information. For example, the Copyright Act, 17 U.S.C. § 105 (1977), exempts government information from copyright protection. The Freedom of Information Act requires public disclosure of agency records, subject to certain specific exceptions. 5 U.S.C. § 552 (1988). See *Department of the Air Force* v. *Rose*, 425 U.S. 352, 361 (1976) ("disclosure, not secrecy, is the dominant objective of [FOIA]").

Similarly, the Government in the Sunshine Act requires most agency business to be conducted in a manner that is "open to public observation." 5 U.S.C. § 552b (1977).

Congress is well aware that some policy objectives may at times interfere with the principles of open government and has demonstrated in numerous instances, mostly relating to national security, that it knows how to exempt certain information from the presumption of full disclosure when it wants to. See, *e.g.*, The Espionage Act, 18 U.S.C. § 793 (1976); Atomic Energy Act, 42 U.S.C. §§ 2161-2166 (1973); Intelligence Identities Protection Act of 1982, 50 U.S.C. §§ 421-26 (1991); Arms Export Control Act, 22 U.S.C. §§ 2751-2796 (1990); National Security Act, 50 U.S.C. § 401-432 (1991). These statutes, and the regulations promulgated pursuant to them, provide specific prohibitions concerning the disclosure of information or data.[6] See, *e.g.*, 22 C.F.R. §§ 120.21, 121.1 (U.S. Munitions List regulations). Even in FOIA, which embodies the presumption of openness, Congress has provided specificity in setting forth the

---

[6] The government here has taken the position that an informal, unwritten rule is sufficient and it is this position which *Amici* assert is demonstrably incorrect. Therefore, for purposes of this case, the Court need not consider whether formal regulations, published in the Code of Federal Regulations and subject to the usual notice and comment periods as well as the other provisions of the Administrative Procedures Act ("APA"), 5 U.S.C. § 551 (1977), can define conduct subject to criminal sanctions. However, formal rulemaking procedures are distinguishable from the kinds of informal practices on which the government relies in this case. Rulemaking is conducted in accordance with an Act of Congress – the APA – and generally is undertaken pursuant to statute. Moreover, because such rules are in published form, Congress can exercise its oversight function. Thus, formal rulemaking procedures have at least some imprimatur of congressional approval, a characteristic completely absent here.

information that can be withheld, subject to rights of appeal within the agency and to judicial review. 5 U.S.C. § 552(b).

Congress' and this Court's treatment of Exemption 3 to FOIA's disclosure mandate (5 U.S.C. § 552(b)(3)) is instructive in demonstrating Congress' intent and ability to narrowly circumscribe exceptions to the presumption of open access to government information. As originally enacted, Exemption 3 protected information "specifically exempted from disclosure by statute." 5 U.S.C. § 552(b)(3)(1970). In *FAA* v. *Robertson*, 422 U.S. 255 (1975), this Court interpreted Exemption 3 to allow statutes predating FOIA which permitted the withholding of information to remain unaffected by the presumption of disclosure in FOIA. 422 U.S. at 265. The Court therefore held that a provision in the Federal Aviation Act providing nearly unlimited discretion to agency officials to withhold particular documents "in the interest of the public" fell within Exemption 3. *Id.* at 266.

Concerned that the holding in *Robertson* would enable agencies to subvert FOIA's mandate of disclosure, Congress amended Exemption 3 in 1976 to avoid open-ended discretionary agency decisionmaking regarding government disclosure. As amended, Exemption 3 allows an agency to withhold information where a statute: "(A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld." 5 U.S.C. § 552(b)(3)(1977).

These enactments demonstrate Congress' abiding concern for the principle of access to government information. In light of these considerations, the "without authority" language must be read narrowly to avoid infringing on the central role of open access to information in our system of government. Permitting informal, unwritten customs and practices to trigger criminal sanctions would give government agencies unbridled "authority" to choose among the vast array of

government information and render its dissemination or receipt criminal conduct. That scenario is incompatible with the open system of government envisioned by the Founders and the Congress.

D. The Court Of Appeals' Reading Of "Without Authority" Is Contrary To Separation Of Powers Principles

1. Congress Is The Appropriate Entity To Determine Whether And When Disclosure Or Receipt Of Information May Be A Crime

It is Congress, not bureaucrats, prosecutors or the Courts, that has the authority to criminalize conduct relating to the flow of information. *United States* v. *Kozminski*, 487 U.S. 931, 939 (1988) ("Federal crimes are defined by Congress, and * * * this Court must give effect to Congress' expressed intention concerning the scope of the conduct prohibited"); *Liparota* v. *United States*, 471 U.S. 419, 424 (1985) ("The definition of the elements of a criminal offense is entrusted to the legislature, particularly in the case of federal crimes, which are solely creatures of statute"). "[B]ecause of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity." *United States* v. *Bass*, 404 U.S. 336, 348 (1971). For these reasons, Congress' determination that particular conduct warrants the imposition of criminal sanctions must be "plain[ ] and unmistakabl[e]". *United States* v. *Gradwell*, 243 U.S. 476, 485 (1917)(quoting *United States* v. *Lacher*, 134 U.S. 624, 628 (1890)).

2. Section 641 Cannot Apply To Information Whose Disclosure Is Not Prohibited By Statute Or Regulation

The Fourth Circuit's interpretation of the words "without authority" would put the decision to criminalize the

dissemination of particular kinds of government information in the hands of individual executive branch workers. See *United States* v. *Truong Dinh Hung*, 629 F.2d 908, 925 (4th Cir. 1980) (§ 641 as written provides no standard for exercise of discretion by upper level government employees and may result in arbitrary denial of access to public information). The "internal policies, customs and practices" of a government agency – precisely the thin reed on which the petitioners' convictions were hung – are often unclear and confusing.[7] Reliance on them in this context would subvert

---

[7] A Senate hearing that took place before the effective date of the Procurement Integrity Act (see pages 14-15, *infra*) concerning "DoD's Management of Inside Information in the Acquisition Process" provides some insight into the highly confusing nature of the informal practices at issue in this case. *Oversight of DoD's Management of Inside Information in the Acquisition Process: Hearing Before the Subcommittee on Oversight of Government Management of the Committee on Governmental Affairs, United States Senate*, 101st Cong., 1st Sess. (1989) [hereinafter "*Oversight Hearing*"]. The hearing was dominated by discussions of practices relating to disclosure of procurement and planning information that were in effect at the time of Petitioners' conduct. The hearing's participants concluded that not only were the Pentagon's practices unclear and misunderstood but, because they provided no guidance as to what types of procurement documents were disclosable, DoD representatives had great discretion to make their own judgments on disclosure of government information. See, *e.g.*, *Oversight Hearing* at 3 (Sen. Levin)("a review of the services' policies and regulations reveals a system of rules and regulations that are highly complex, confusing, unclear, and occasionally misunderstood even by the officials responsible for administering them."); *Oversight Hearing* at 44 (Sen. Levin)("So those two guidances which are pointed to as the standard for whether something is disclosable doesn't [sic] give you guidance on disclosability, because under both * * * of those standards, contractors can have access to those documents"). This confusion concerning internal practices was

(continued...)

Congress' power to determine what conduct should be subject to criminal sanctions and permit arbitrary results obviously contrary to congressional intent.[8] For example, the manager of a section in an executive agency could circulate an informal policy memo (or adopt an informal custom) declaring that no dissemination of information to the public may be made that would be embarrassing to his or her agency or to the President. A reporter or historian who obtained this information through an interview of a government employee and without resort to bribery or other improper means would then be subject to criminal sanctions.[9]

---

[7] (...continued)
made even worse by the high turnover in procurement positions at DoD. *Oversight Hearing* at 28 (Sen. Kohl).

As a result of the concerns expressed at the Hearing, Dr. Robert Costello, Under Secretary of Defense for Acquisition, declared that there was a need for "a clear and comprehensive statement of DoD's disclosure policies in a single document which will be widely distributed to both contractors and DoD personnel by the end of the year." *Oversight Hearing* at 45. Senator Levin concluded: "[we need] to make sure there is a line, so that we do not put people at peril and at risk in trying to get information." *Oversight Hearing* at 62.

[8] Senator Levin remarked that the DoD practices in place at the time of Petitioners' conduct permitted individual procurement officers to have discretion over disclosure of government information: "Document type after document type after document type is either disclosable or not disclosable according to individual procurement officers by their judgment as to whether or not that 'For Official Use Only' stamp allows it to be disclosed, and that doesn't tell you a damn thing." *Oversight Hearing* at 44 (Sen. Levin).

[9] Ironically, while Petitioners were convicted of receiving information contrary to certain informal practices, their receipt of
(continued...)

Such an outcome flies in the face of separation of powers principles by providing executive branch employees with the authority to, in essence, pass new criminal statutes.[10] It would enable individual employees to determine what is deserving of "the moral condemnation of the community." *Bass*, 404 U.S. at 348. This formulation is plainly incorrect in that it provides no "assur[ance] that the society, through its representatives, has genuinely called for the punishment to be meted out." *United States* v. *R.L.C.*, 112 S.Ct. 1329, 1340 (1992) (Scalia, J., concurring). Permitting informal agency policies and practices concerning information to form the test

---

[9] (...continued)
this information was consistent with other informal methods of operation at the Department of Defense regarding the sharing of information with contractors. As explained by Senator Grassley, the informal exchange of information between government and contractors had become so widespread prior to the enactment of the Procurement Integrity Act, it had "become a way of life," and a "cultural phenomenon" within the military-industrial complex. 135 Cong. Rec. S15960 (Nov. 17, 1989) (statement of Sen. Grassley). Then-Under Secretary of the Navy Garrett declared that within the sphere of government contracting, the information gathering activities of private corporations, even if to gain advantage over competitors, were "indispensable to proper fusion of Government's requirements with industry's capabilities." (*Oversight Hearing* at 74). Thus, adopting the government's interpretation would permit prosecutors to pick and choose among various internal policies to determine what they believe should define criminal sanctions. This is hardly the kind of "clear and unambiguous" demarkation of criminal conduct that this Court has declared to be Congress' role.

[10] Cf. *Liparota*, 471 U.S. at 427 ("Of course, Congress could have intended that this broad range of conduct be made illegal, perhaps with the understanding that prosecutors would exercise their discretion to avoid such harsh results. However, given the paucity of material suggesting that Congress did so intend, we are reluctant to adopt such a sweeping interpretation.").

of criminal conduct would render Section 641 a penal statute of sweeping application that would "encourage arbitrary and discriminatory enforcement." *Kolender* v. *Lawson*, 461 U.S. 352, 357 (1983). Accordingly, because the Court of Appeals' decision would violate separation of powers principles and contravene congressional intent, this Court should reverse that decision.

II. INFORMATION IS NOT A "THING OF VALUE" UNDER SECTION 641

It is not clear that Section 641 should be applied to information at all. There is nothing in Section 641 or in its legislative history to suggest that Congress intended to reach this delicate area. *United States* v. *Tobias*, 836 F.2d 449, 451 (9th Cir. 1988) (section 641 inapplicable to information), *cert. denied*, 485 U.S. 991 (1989); *Truong Dinh Hung*, 629 F.2d at 926 ("Congress was never consciously aware that § 641 would punish the unauthorized disclosure of government information").[11] It is at least a plausible construction of Section 641 that "thing of value" should apply only to tangible items. *United States* v. *Tobias*, 836 F.2d at 451. The "conversion" prohibited by Section 641 was not intended to be a new crime. Rather, Section 641 was designed "to recodify [crimes] then in existence." *Morissette* v. *United States*, 342 U.S. 246, 269 n.28 (1952). At common law, only tangible property could be "converted." 89 C.J.S. *Trover and Conversion* § 11 (1955).

For all of these reasons, the "thing of value" language must be considered, at a minimum, to be ambiguous. Where a narrower construction of an ambiguous criminal statute is plausible, the rule of lenity requires the Court to adopt the more restrictive reading. See *United States* v. *Kozminski*, 487

---

[11] See also Benjamin DuVal, *The Occasions of Secrecy*, 47 U. Pitt. L. Rev. 579, 595-96 n.42 (1986)(Congress did not contemplate restricting access to information by enacting Section 641).

U.S. at 952 (1988) ("uncertainty regarding the ambit of criminal statutes should be resolved in favor of lenity"). Here, the rule of lenity dictates that the term "thing of value" should not be read to include government information.

The Court of Appeals' reading of Section 641 is especially anomalous because it makes a mockery of Congress' carefully considered action in enacting the Procurement Integrity Act of 1988 ("PIA"). 41 U.S.C. § 423 (Supp. 1992). Congress' determination that this legislation was necessary demonstrates that it did not believe that Section 641 applied to Petitioners' conduct. The legislative history of the PIA reveals myriad examples of Congress' belief that no law existed to prohibit receipt of unclassified procurement information.[12] Because of this belief and in order to enable contractors and the Pentagon to adjust their conduct in light of the Act's criminal penalties to what Congress viewed as a substantially different regime, Congress initially delayed the effective date of the PIA for six months. See Pub. L. No. 100-679, § 6(b), 102 Stat. 4068 (1988). Congress then delayed the effective date for an additional two months to permit contractors to become familiar with the new

---

[12] During debate on 1989 legislation that would have repealed the PIA, Senator Grassley declared: "This is the only law on the books that restricts the use of nonclassified procurement information." By repealing it "there is not going to be any law to stop the * * * practice of document trafficking within the contracting community." 135 Cong. Rec. S15961 (Nov. 17, 1989). Senator Grassley also stated that prosecutors with whom he had spoken believed that pre-PIA law was adequate for prosecution of procurement cases only where "there was evidence of bribery or conspiracy or some other illegal activity. But without this law, there are no prohibitions to giving sensitive information to favored contractors. That's what we're talking about here." 135 Cong. Rec. S15992 (Nov. 17, 1989). There is no suggestion in this case that Petitioners obtained the information in question through bribery or other improper means.

regulations implementing the PIA. See Pub. L. No. 101-28, 103 Stat. 57 (1989); 135 Cong. Rec. H1876 (May 15, 1989)(remarks of Rep. Conyers). Finally, despite intense efforts by certain members, Congress suspended the effective date of the Act for a year until December 1, 1990, when it ultimately became effective. See Pub. L. No. 101-194, § 507(1), 103 Stat. 1759 (1989).

Absent any mention of government information in Section 641, then, and in view of Congress' demonstrated ability to provide particular provisions concerning information where its statutes concern information dissemination, the Court should conclude that Congress did not intend that Section 641 apply to information.

III. MEANS OTHER THAN IMPOSING CRIMINAL SANCTIONS ON THE RECIPIENT ARE AVAILABLE TO ENFORCE LEGITIMATE INTERNAL RESTRICTIONS ON DISSEMINATION OF GOVERNMENT INFORMATION

Amici do not mean to suggest that there can be no informal restrictions on the disclosure of government information. However, the difficulties inherent in limiting the dissemination of government information are particularly acute where criminal sanctions are threatened or imposed on private citizens who acquire the information without resort to bribery or other improper influence. The factors outlined above weigh against the imposition of criminal sanctions on private citizens for simply receiving government information absent "carefully drawn legislation." Stewart, 26 Hastings L.J. at 636. The balance of these factors may weigh differently when government employees are the subjects of particular restrictions, especially when criminal sanctions are not at issue.

The Executive Branch may limit the dissemination of government information through informal restrictive policies

constraining government employees in some instances. DuVal, 47 U. Pitt. L. Rev. at 672 ("Informal pressures and administrative sanctions * * * are the principal means of preventing the dissemination of government controlled information."); Harold Edgar & Benno Schmidt, *Curtiss-Wright Comes Home: Executive Power and National Secrecy*, 21 Harv. C.R.-C.L. L. Rev. 349, 356 (1986)("No one doubts that the Executive can invoke a wide range of administrative sanctions to enforce secrecy rules on its employees; the more difficult questions concern resort to broader sanctions that must be enforced by the courts."). Along with these internal policies, agencies may impose disciplinary measures on employees who violate the policies. Those who are aware of the informal policies and practices are then presumably aware of the corresponding penalties for breach. In this manner, agencies have the means to enforce legitimate interests in confidentiality while providing the requisite notice of penalties to government employees.

However, to enforce these internal policies against private citizens through criminal prosecution is intolerable in our system of government. See Edgar & Schmidt, 21 Harv. C.R.-C.L. L. Rev. at 406 ("Perhaps it is tolerable to permit the Executive to shape the conditions of government employment without clear guidance, but for the courts to use the criminal law this way ignores the prohibition on common law crimes."). Whatever the authority of the Executive Branch to discipline its employees for the violation of internal rules, it is up to Congress to decide what conduct to punish criminally. In the case of procurement sensitive information, Congress decided to criminalize its disclosure and receipt, but *after* the acts at issue here.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

JAMES L. QUARLES III
DAVID A. WILSON
SEAN P. SHERMAN
Hale and Dorr
1455 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 393-0800

MARCH 1993

Supreme Court, U.S.
FILED
MAR 10 1993
OFFICE OF THE CLERK

No. 92-960

In the Supreme Court of the United States

OCTOBER TERM, 1992

THOMAS D. MCAUSLAND AND CHRISTOPHER M. PAFORT,
Petitioners

v.

UNITED STATES OF AMERICA,
Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

REPLY BRIEF FOR THE PETITIONERS

ANDREW L. FREY
Counsel of Record
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 778-0602

TABLE OF AUTHORITIES

Cases: Page

Carpenter v. *United States*, 484 U.S. 19 (1987) 7

Chappell v. *United States*, 270 F.2d 274 (9th Cir. 1959), cert. denied, 485 U.S. 991 (1988) 6

Dowling v. *United States*, 473 U.S. 207 (1985) 5

United States v. *Fowler*, 932 F.2d 306 (4th Cir. 1991) 6

United States v. *Friedman*, 445 F.2d 1076, cert. denied, 404 U.S. 958 (1971) 6

United States v. *Girard*, 601 F.2d 69 (2d Cir.), cert. denied, 444 U.S. 871 (1979) 8, 9

United States v. *Jeter*, 775 F.2d 670 (6th Cir. 1985) cert. denied, 475 U.S. 1142 (1986) 6, 9

United States v. *Lambert*, 446 F. Supp. 890 (D. Conn. 1978) 8

United States v. R.L.C., 112 S.Ct. 1329 (1992) 3

TABLE OF AUTHORITIES - Continued

Page

United States v. *Schwartz*, 785 F.2d 673 (9th Cir.), cert. denied, 479 U.S. 890 (1986) 6

United States v. Tobias, 836 F.2d 449 (9th Cir. 1988), cert. denied, 485 U.S. 991 (1989) 6

Statutes and regulations:

18 U.S.C. § 371 7

18 U.S.C. § 641 . . . . . 5, 6, 7, 9

18 U.S.C. § 1343 7

48 C.F.R. (1987)
§ 15.1001(a), (b) 3
§ 15.609(c) 3
§ 5.401(b)(1) 4
§ 15.413-1(b) 4

Miscellaneous:

Gallegos Research Group Corp., 89-3 B.C.A. (CCH) ¶ 21,901 at 110,240-41 (1989) 3

In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-960

THOMAS D. MCAUSLAND AND CHRISTOPHER M. PAFORT,
Petitioners

v.

UNITED STATES OF AMERICA,
Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

REPLY BRIEF FOR THE PETITIONERS

This case presents an issue of substantial importance – whether criminal liability may be imposed on private citizens for theft of government property or taking property by fraud when they obtain disclosure of government information, even though such disclosure is not prohibited by statute or published regulation, but only by internal government directives, custom or practice. Although it attempts to obscure the point by the inclusion of much irrelevant material in its somewhat distorted statement of the case, in the end the government cannot and does not deny that this case was charged, tried, submitted, and upheld on appeal on the theory that a criminal prosecution for theft of government information requires no statute or regulation prohibiting disclosure of the information in question. Instead, the government suggests that the issue, although squarely presented, does not warrant review in this case. The government's opposition is unconvincing.

1. We begin by setting the record straight regarding the applicability of Federal Acquisition Regulations (FARs) to the information obtained by petitioners. In its "Statement" (*e.g.*, Opp. 4-7 & nn.1-5), the government incorrectly implies that disclosure of the information was plainly covered by DoD regulations. We cannot leave unanswered this attempt to obscure the fact that the issue raised in the petition is indeed cleanly presented in this case.

First, it must be recognized that it is *the government* that has steadfastly opposed any requirement that it show that petitioners' conduct violated some published, publicly available regulation (or statute). Throughout the trial, petitioners vigorously sought to have their receipt of information measured against the rules set out in the FARs, while the prosecution maintained with equal vehemence that government custom, practice, or internal directives constituted sufficient bases for liability. See Pet. 5-9. Indeed, if as the government now insinuates, disclosure of the pertinent information was clearly prohibited by published regulations, its adamance at trial on this central point is incomprehensible. Having fervently opposed any attempt to limit the theory of the prosecution to standards in published regulations, the government should not now be permitted to duck the issue by suggesting that regulations in fact prohibited the disclosures.

Second, contrary to the implication that its Statement looks to the duly promulgated FARs for the framework governing procurement information (see Opp. 2-7), the Opposition in fact relies extensively on *internal* administrative directives that are not part of the FARs at all. See, *e.g.*, Opp. 4 n.1, 7 n.5; see also Opp. 18. Although the government ultimately concedes that these directives were "unpublished" (Opp. 18), it claims that they were "available to the public" (*id.* at 18 n.16) – apparently on the ground that, as the government stated below, the directives "would have been available through the Freedom of Information Act." Gov't

C.A. Br. 17 n.11. The principle that criminal statutes put citizens on notice "descends to needless farce when the public is charged even with knowledge of [congressional] Committee Reports," *United States* v. *R.L.C.*, 112 S. Ct. 1329, 1340 (1992) (Scalia, J., concurring in part); the implication that citizens may be charged with knowledge of purely internal government directives because they would be discoverable under FOIA is similarly untenable and should not be permitted to divert attention from the central issue in the case.[1]

Third, the government ultimately concedes – as it must – that disclosure of some of the most important information at issue (such as the FOCS acquisition plan and the ATACC evaluation weights) was *not* covered by any applicable FAR or statute. See Opp. 18; see also Pet. 21 n.25.

Fourth, even with respect to the FARs that it does cite, the government's presentation is incorrect and misleading. For example, it implies that petitioners' receipt of information that Litton's proposal had been deemed unacceptable violated the FARs. See Opp. 5 n.3. The government fails to mention that, under the FARs, a bidder was affirmatively *entitled* to know that its proposal had been deemed unacceptable *as soon as* the government had made that decision. See 48 C.F.R. §§ 15.1001(a), (b), 15.609(c) (1987); see also *Gallegos Research Group Corp.*, 89-3 B.C.A. (CCH) ¶ 21,907, at 110,240-41 (1989).[2] Indeed, the government fails even to acknowledge

---

[1] It also must be emphasized that a great deal of the government's case rested not on internal (but at least written) government directives, but simply on "custom and practice" of non-disclosure. See Pet. 6-9.

[2] The government acknowledged below that, pursuant to the FARs, "contracting officers should *ordinarily* promptly notify offerors whose proposals have been found to be unacceptable." (continued...)

that the district court granted a downward departure under the Sentencing Guidelines because it found that petitioners' conduct was "committed under an unclear regulatory regime." See C.A. App. 63, 65. (The government has not challenged the district court's finding or its sentencing departure).

The fundamental point, however, is that the government adamantly and successfully refused petitioners' repeated efforts to have this case turn on whether disclosure of the information at issue was or was not prohibited by the FARs (or any other publicly available regulations or statute). Having staunchly defended its decision to base this case on a theory that internal directives or custom and practice could be a basis for criminal liability, the government should not now be heard to change its tune.[3]

2. An essential cornerstone of the government's legal theory is the proposition that government information is

---

[2] (...continued)
Gov't C.A. Br. 40 (emphasis added). Similar flaws infect the government's discussion of other FARs. See Pets. C.A. Br. 36-40; Pets. C.A. Reply Br. 15-18. Among other errors and omissions, the government ignores the fact that the FARs made procurement information presumptively releasable, at the discretion of the contracting officer. See *e.g.*, 48 C.F.R. §§ 5.401(b)(1), 15.413-1(b) (1987); see also Pets. C.A. Br. 32-36.

[3] It bears emphasis that, if certiorari is granted, this Court will not be required to resolve any disputes about the meaning or reach of the FARs. As the case comes to the Court, the convictions rest on the principle that no statute or regulation prohibiting disclosure of information is necessary for theft of government property and wire fraud; it is solely the correctness of that proposition that the Court would be required to resolve. If the Court were to agree with petitioners, the meaning and applicability of the FARs could be addressed in subsequent proceedings in the lower courts.

government property under the pertinent statutes. As we explained in the petition (at 12-17), this threshold issue is of unquestionable importance. The differences between tangible government property and government information are readily apparent. Imposition of criminal liability for receipt of government information, moreover, raises an issue at the core of the citizen's relationship to the government.

a. With respect to Section 641, the proposition that receipt of government information is "conversion" of a "thing of value" is unconvincing. There can be no serious contention that the Congress that enacted Section 641 contemplated its application to government information (see Pet. 14 n.15) – and the Opposition does not suggest otherwise. It does argue that the statutory language unambiguously broadens the original congressional purpose (Opp. 13), but it is far from clear that the government may so readily escape the rule of lenity. See Pet. 14. Nor is the government's wholesale rejection (Opp. 13 n.10) of the relevance of *Dowling* v. *United States* sustainable. All of the factors relied upon in *Dowling* – the statute's language and history, the statute's focus on physical goods, the relation between the statute and legislation in other information contexts, and the broad reach of the government's theory (473 U.S. at 214-227) – are pertinent here. The government also ignores the historic meaning of "conversion," which applied only to tangible property and which counsels strongly against the government's interpretation. See Pet. 14 & n.16. Finally, contrary to the government's assertion (Opp. 13-14 n.11), adoption of its theory raises significant constitutional questions, as numerous jurists and commentators have recognized (Pet. 11, 15 & n.18, 25 n.34, 29).

In addition, the government is on exceedingly weak ground in suggesting that there is no uncertainty or conflict in the lower courts. The Ninth Circuit and other circuits have explicitly disagreed about whether Section 641 applies to

intangibles, such as information.[4] The government offers three insubstantial reasons for dismissing this obvious disagreement. First, it claims that a footnote in *United States* v. *Schwartz*, 785 F.2d at 681 n.4, casts doubt on the Ninth Circuit's rule. Soon after *Schwartz*, however, the Ninth Circuit explicitly and unambiguously clarified that *Chappell* remains good law and that *Schwartz* concerned an entirely different statute with an entirely different legislative history. *Tobias*, 836 F.2d at 451. (Indeed, Judge Anderson, the author of *Schwartz*, was a member of the unanimous panel in *Tobias*.) Second, the government is not aided by *United States* v. *Friedman*, 445 F.2d 1076 (9th Cir.) (see Opp. 16 n.13): the defendant in that case did not "argue that, as a matter of law, the information contained in the transcripts was not government property." *Id.* at 1087. Third, the attempt (Opp. 15) to limit *Chappell* to the intangible of government services is unavailing: the government offers no principled basis for such a limitation, and the Ninth Circuit has not read the case in such a stinted fashion. See *Tobias*, 836 F.2d at 451.

b. The attempt to minimize the significance of the issue with respect to the fraud statutes is similarly unconvincing. Here, too, no claim can be or is made that the enacting

---

[4] See *United States* v. *Tobias*, 836 F.2d at 451 ("We note that two circuits have reached conclusions contrary to ours on this point. * * * However, we are not persuaded that we should reconsider *Chappell*"); *United States* v. *Fowler*, 932 F.2d at 309-310 (4th Cir.) (The Ninth Circuit has held that "§ 641 did not apply to intangible property, including classified government information. * * * We agree with the Second and Sixth Circuits that conversion and conveyance of governmental information can violate § 641."); *United States* v. *Jeter*, 775 F.2d at 680 (6th Cir.) (following Circuit precedent in holding that Section 641 applies to an intangible such as information and recognizing that *Chappell* is "*contra*").

Congress contemplated application of the statutes to government information. The government seeks to wrap itself in the mantle of *Carpenter* v. *United States*, 484 U.S. 19 (1987), but, because of the obvious distinction between government and private information, it is driven to fashion a novel "market participant" doctrine for the mail and wire fraud statutes (Opp. 12 n.9) – an innovation that would plainly warrant this Court's careful consideration. Although the government attempts to distinguish decisions adopting a narrow view of "property" in the mail fraud statute with respect to the government's intangible information rights on the ground that they do not involve procurement information (Opp. 16-17 n.15), these divergent decisions regarding the government's intangible "property" rights strongly support review. See Pet. 17 n.19.[5]

3. As with the question whether the pertinent statutes apply to information at all, the issue whether liability may be imposed in the absence of a statute or published regulation prohibiting disclosure is an exceptionally important one on which uncertainty prevails in the lower courts.

As explained in the petition (at 18-24), a requirement that the government manifest a property right in exclusive use of government information through statute or regulation is

---

[5] The implication (Opp. 12 n.9) that petitioners have not preserved the claim that government information is not property under the wire fraud statute is untenable. Petitioners argued below that government information is not government property under Section 641 and that the principles that prevent liability for theft of government property also prevent liability for wire fraud. See Pets. C.A. Br. 28 n.10, 30-31 and C.A. Reply Br. 3 (issue is when "should a person who seeks out facts known to the government be deemed to have taken a 'thing of value' of the government 'without authority' (§ 641) or to have 'defrauded' the government of its intangible property (§§ 371, 1343)").

needed to give concrete, ascertainable meaning to the pertinent statutory terms. According to the government (Opp. 19-20), receipt of government information is criminal so long as the recipient knows that its disclosure is "not authorized," even though the context and meaning of that term are nowhere explained or defined. Indeed, the government says *nothing* to contradict our submission that, under its theory, virtually any unauthorized leak or whistleblower's complaint may subject a non-government recipient to criminal liability, so long as the recipient knows that the disclosure was not "authorized". To the contrary, it pronounces that criminal liability is appropriate if private individuals know that government officials do not wish disclosure of the information that the individuals seek. Opp. 19-20. But contrary to the government's implication, knowledge that government officials do not *approve* of disclosure of information is not equivalent to knowledge that the government has properly established its exclusive dominion over the information.

Moreover, the government's attempt to claim that there is no division on this issue in the lower courts is wholly unconvincing. The Second Circuit has unambiguously stated that the government's "own rules and regulations forbidding * * * disclosure may be considered as both *a delimitation and a clarification* of the conduct proscribed by the statute." *United States* v. *Girard*, 601 F.2d at 71 (emphasis added). Contrary to the government's suggestion (Opp. 21), *Girard*, unlike this case, did *not* present a situation in which release of some of the information had been prohibited solely by unpublished regulations. Rather, release of the information at issue in *Girard* was prohibited *both* by published regulations and unpublished regulations. See *United States* v. *Lambert*,

446 F. Supp. 890, 900 (D. Conn. 1978), aff'd, *Girard*, *supra*.[6]

4. Finally, the government suggests that the case is not of continuing importance for two reasons: (1) Congress has subsequently enacted the Procurement Integrity Act; and (2) the government proceeded in this case, not against reporters, but against businessmen. Neither objection is substantial.

a. The importance of the question of the application of the general theft and fraud statutes to government information is hardly confined to the procurement context (see Pet. 25, 29-30), as the outpouring of amicus interest in this petition confirms, so that the passage of the Procurement Integrity Act does not begin to diminish the general significance of this case.

In addition, the subsequent enactment of a statute specifically regulating disclosure of procurement information dramatically highlights the severe unfairness of this prosecution. The history and passage of the statute make unmistakably clear that Congress acted because, in its view, dissemination of government procurement information was *not* proscribed by existing criminal statutes. Pet. 26-28. The government's cavalier dismissal (Opp. 23 n.22) of this congressional belief misses the point. The widely held view of Members of Congress, after careful study, that there were *no* formal restrictions prohibiting dissemination of procurement information vividly illustrates the hazards and arbitrariness of permitting information theft prosecutions without requiring that a statute or regulation prohibit dissemination of the information. (Indeed, high-ranking government officers emphasized the

---

[6] Also contrary to the government (Opp. 22), *Jeter* specifically relies on the *Girard* principle that government regulations "'may be considered as both a delineation and a clarification of the conduct proscribed by [§ 641].'" 775 F.2d at 682.

importance of informal information-gathering by procurement bidders. See Pet. 26-27.)

b. The government also asserts (Opp. 24 n.23) that this case is not significant because the prosecution was not brought against journalists, and that it can be trusted to use discretion in selecting targets for information-theft prosecutions. But when the First Amendment is implicated, executive enforcement discretion is ordinarily a vice, not a virtue. In any event, the government's assertion fails to provide a reasoned basis for distinguishing in this context between journalists and the rest of the public. As the amicus briefs reveal, the ruling of the court of appeals in this case has engendered deep concern among a wide range of interested parties. These groups recognize that the ramifications of the case are far-reaching, and could be used to impose criminal liability on anyone who receives government information deemed "unauthorized" for release even though no rule adopted through the public law-making process prohibits dissemination of the information.

The issue presented is of surpassing importance and has been the subject of widely varying treatment in the lower courts. The petition for a writ of certiorari should be granted.

Respectfully submitted.

ANDREW L. FREY
Counsel of Record
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 778-0602

MARCH 1993